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Virginia Law Review

September, 1995

81 Va. L. Rev. 1665

LENGTH: 32418 words

NOTE: CONTENT-BASED DISTINCTIONS IN A UNIVERSITY FUNDING SYSTEM AND THE IRRELEVANCE OF THE ESTABLISHMENT CLAUSE: PUTTING WIDE AWAKE TO REST

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* I am grateful to Professor Michael Klarman and Daryl Levinson for their suggestions and comments.

SUMMARY:
... Forcing a public university to fund unabashed Christian proselytization of this sort on First Amendment Free Speech grounds, at least at first blush, seems to raise obvious Establishment Clause issues. ... Examining first Wide Awake's free speech claim, the Court of Appeals queried whether the University, "having chosen to promulgate guidelines governing the allocation of funds that support student speech among competing student interests, [could] ... condition funding awards on the content or viewpoint of a prospective recipient's speech." ...) Moreover, the Court seems to suggest that were the University's regulations broader than a mere exclusion of lobbying and electioneering, they would be called into question under the Free Speech Clause as wrongful discrimination against the "political viewpoint." ... The term "subject-matter distinction" is used to signal a regulation that excludes an entire category of positions on a given idea; and the term "viewpoint-based distinction" refers to a regulation that excludes only one position on a given idea. ... Against a challenge on free speech grounds, Rust upheld a government funding scheme that conditioned an award of monies for family planning programs on the recipient medical staff's agreement to promote only the government's view on abortion. ...

TEXT:
[*1665]

Introduction

When you get to the final gate, the Lord will be handing out boarding passes, and He will examine your ticket. If in your lifetime, you did not request a seat on His Friendly Skies Flyer by trusting Him and asking Him to be your pilot, then you will not be on His list of reserved seats .... You will be met by your chosen pilot and flown straight to Hell on an express jet (without air conditioning or toilets, of course). n1

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n1. Stephanie Ace, The Plane Truth, Wide Awake: A Christian Perspective at the University of Virginia, Nov./Dec. 1990, at 3, quoted in Rosenberger v. Rector & Visitors of Univ. of Virginia, 115 S. Ct. 2510, 2534 (1995) (Souter, J., dissenting).

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Forcing a public university to fund unabashed Christian proselytization of this sort on First Amendment Free Speech n2 grounds, at least at first blush, seems to raise obvious Establishment Clause n3 issues. A deeper survey reveals implications more insidious and far-reaching than the immediate merger of Church and State that (arguably) results from government subsidization of religion. Relying on constitutional free speech jurisprudence to dictate a public university's policy decisions usurps from the university the right to define what is educational. Today it is coerced financing of religious exhortation - students who refuse to welcome Christ in their hearts will suffer a ride to Hell without amenities; tomorrow it may be prescribed grants to students authoring "essays on making pasta and peanut butter cookies." n4 The First Amendment's Free Speech Clause requires neither blow to education.

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n2. The Free Speech and Press Clause provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I.

n3. The Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

n4. See Rosenberger, 115 S. Ct. at 2549.

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The First Amendment jurisprudence dealing with the permissibility of selective subsidization of speech based on its content is plagued by confu- [*1666] sion and contradiction. n5 Rosenberger v. Rector & Visitors of University of Virginia, n6 a case the United States Supreme Court recently decided, presented the Court with an opportunity to resolve some First Amendment inconsistencies in the context of a public university funding scheme that denies funding to certain student groups because of the content of their speech. Instead, the Court's opinion only sows more doubt. Part I of this Note traces the factual and procedural history of the Rosenberger case. Part II suggests that the United States District Court for the Western District of Virginia and the United States Court of Appeals for the Fourth Circuit both reached exactly the right result - a public university can legally refuse to fund religious groups - for precisely the wrong reason - that the Establishment Clause of the First Amendment dictates such a conclusion. In turn, the Court majority and the dissent continued with two mistaken views of the Court of Appeals: the majority endorsed the Court of Appeals' impossible extension of the First Amendment Free Speech Clause in reversing that court's holding, while the dissent, like the Court of Appeals, indicated that the case should be decided on Establishment Clause grounds. This Part urges that practical considerations compel a legal framework that allows a public university to rely on content-based distinctions in allocating funds regardless whether the distinctions implicate the

Establishment Clause, and Part II offers an abbreviated philosophical justification for a legal regime that permits content-based distinctions. Part III searches First Amendment doctrine to find support for content-based distinctions in the Rosenberger context from the Court's subsidy/taxation, public forum and education cases, despite incidences of categorical language indicating to the contrary. Part III concludes that the Supreme Court's . effective collapse of (permissible) content-based distinctions into the category of (impermissible) viewpoint-based distinctions may conform to several recently decided cases, but only at the price of creating an untenable conflict with long-standing First Amendment Free Speech jurisprudence.

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n5. For a useful yet compact summary of First Amendment law in this area, see Laurence H. Tribe, American Constitutional Law 12-1 to -6, at 785-825, 12-23 to -25, at 977-1010, 12-34, at 1039-42 (2d ed. 1988).

n6. 115 S. Ct. 2510 (1995), rev'g 18 F.3d 269 (4th Cir. 1994), aff'g 795 Supp. 175 (W.D. Va. 1992).

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I. The Rosenberger Case

A. Factual Background

For the stated purpose of "providing financial support for studentorganizations that are related to [its] educational pur- [*1667] pose," n7theUniversity of Virginia (the "University") has established a Student Activities Fund ("SAF") financed by a mandatory fee charged all full-time University students. n8 As a threshold criterion for receiving funds from the SAF, a student group has to qualify with the University as a Contracted Independent Organization ("CIO"). n9 The University imposes only minimal demands on groups seeking CIO status: a group must be comprised of a student majority; University students must manage the group; the group must file a current copy of its constitution with the University; and the group must forswear discrimination. n10 If these requirements are fulfilled, the Appropriations Committee of the University's Student Council determines whether to grant monies to CIO applicants requesting funding. n11 In reviewing applications, the Appropriations Committee is constrained by a set of guidelines that have contained, since their promulgation in 1970, various restrictions on the types of organizations and activities that are eligible for funding. n12 Sororities and fraternities, religious and political organizations, and groups with exclusionary membership policies cannot qualify for SAF funds. n13 Similarly excluded from the SAF scheme are expenditures for honoraria and related fees, religious activities, costs associated with social entertainment, philanthropic contributions and like endeavors, and political activities. n14 Funds are distributed among eligible organizations based on the organization's size, the benefits the University derives from the organization's activities, and the extent to which the organization is financially dependent on the [*1668] University. n15 CIOs that are refused funding nonetheless receive various

benefits from the University; they qualify to use University rooms, computers, printers, and various other University property. n16

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n7. Board of Visitors, Univ. of Va., Student Activity Fee Statement of Purpose and Funding Guidelines, mimeo at 1 (Jan. 31, 1991) (unpublished, on file with the Virginia Law Review Association) (quoted in Rosenberger, 795 F. Supp. at 180).

n8. Rosenberger, 18 F.3d at 270. The University collects $ 14 per semester from each full-time student. Id.

n9. Id.

n10. Id. at 177 n.1. Contrary to the Supreme Court's assertion that the University denies religious organizations CIO status, Rosenberger, 115 S. Ct. at 2515, the only criteria for achieving CIO status are the requirements listed in the text. See text accompanying notes 9-10.

n11. Rosenberger, 795 F. Supp. at 177. The University's governing body, the Rector and Visitors of the University of Virginia, has delegated the authority to distribute SAF funds to the University Student Council. Rosenberger, 18 F.3d at 271; see also Brief for Defendant at 2-4, Rosenberger v. Rector & Visitors of Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992) (No. 91-0036) [hereinafter University Trial Brief] (detailing the application process).

n12. Rosenberger, 18 F.3d at 271.

n13. Id. The Court of Appeals, the Supreme Court, and Wide Awake at oral argument carefully distinguished between the University's regulations excluding organizations and its prohibitions on certain activities. This Note sees no need to distinguish strictly between organizations and activities and often refers to the exclusions interchangeably.

n14. Id.

n15. Id.

n16. Id. at 273. In 1991, 135 of 343 CIOs at the University applied for SAF funding. One hundred eighteen CIOs received funding. Id. at 271. Funded groups included the "Gandhi Peace Center, the Federalist Society, Students for Animal Rights, the Lesbian and Gay Student Union, ... the Student Alliance for Virginia's Environment[,] ... the Journal of Law and Politics, ... the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society." Brief for Petitioner at *4-5, Rosenberger v. Rector & Visitors of the Univ. of Va., 1994 WL 704081 (U.S. 1994) (No. 94-329) [hereinafter Wide Awake S. Ct. Brief]. For a more complete listing of funded student organizations and publications, see Rosenberger, 18 F.3d at 271 n.3.

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Among the funding applicants in 1991 was Wide Awake Productions ("Wide Awake"), n17 which requested $ 5,862 to recover costs incurred in publishing its magazine, Wide Awake: A Christian Perspective at the University of Virginia.

n18 In the magazine's first issue the organization's founder and the magazine's editor-in-chief, Ronald W. Rosenberger, declared as the magazine's aims "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." n19 These goals echoed the general purposes of the organization, as outlined in Wide Awake's Constitution: "(1) publishing a magazine of philosophical and religious expressions; (2) facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints; and (3) providing a unifying focus for Christians of multicultural backgrounds." n20

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n17. Rosenberger, 18 F.3d at 271, 273. University student Ronald W. Rosenberger and several of his fellow students founded Wide Awake in 1990 and, soon after its formation, obtained from the University CIO status for the organization. Id.

n18. Id. at 272-73.

n19. Ronald W. Rosenberger, Letter from the Editor, Wide Awake: A Christian Perspective at the University of Virginia, Nov./Dec. 1990, at 2, quoted in Rosenberger, 18 F.3d at 272.

n20. Rosenberger, 795 F. Supp. at 177 n.3. For a thorough review of Wide Awake magazine's contents, see Rosenberger, 18 F.3d at 271-73 & n.8 (remarking on the Christian theme unifying the magazine's articles, the various Christian symbols interspersed throughout the magazine's pages, and the Christian affiliation of a large majority of the magazine's advertisements).

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Upon finding that Wide Awake's magazine constituted a "religious activity," n21 the Appropriations Committee declined Wide Awake's [*1669] request for SAF funds; n22 this denial left undisturbed Wide Awake's CIO [*1670] status and its accompanying privileges. n23 Wide Awake appealed. In response, the full Student Council, then the Associate Dean of Students on behalf of the Student Activities Committee, affirmed the decision of the Appropriations Committee. n24 With no other recourse available to it, Wide Awake filed a claim in federal district court against the University of Virginia, n25 alleging a violation of its rights to free speech, free exercise of religion, and equal protection guaranteed under the First and Fourteenth Amendments to the United States Constitution. n26

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n21. Rosenberger, 18 F.3d at 273 (quoting Letter from Cynthia J. Wilbricht, Vice President for Student Organizations of the University Student Council, to Ronald W. Rosenberger (Feb. 26, 1991)).

n22. Id.

University subsidization of the Jewish Law Students Association and the Muslim Students Association, see supra note 16, but not an association of Christian students, may appear troublesome at first glance. Without further

investigation, however, this fact alone is nondemonstrative. Indubitably, if the University has demonstrated an anti-Christian, anti-Conservative bias in administrating its funding scheme, it has discriminated against Wide Awake and in so doing has violated the Equal Protection Clause. About this there need be no debate, and this Note entertains no arguments on this issue, which is at heart a purely factual matter. A less parochial concern is that, even if the University has not engaged in invidious discrimination, the classifications upon which funding decisions hinge are excessively amenable to manipulation. In other words, the question is whether by creating an artificial dichotomy between cultural groups (which are eligible for University funding) and religious groups (which are not) the University has created a system that inherently encourages arbitrary decisionmaking. Although the worry is most certainly not frivolous, it cannot be crippling. The problem of "borderlineness" persists everywhere and is one society generally accepts, bending reluctantly to practical necessity. Most sixteen year olds are better prepared to drive than fifteen year olds, but there will be some fifteen year olds that are more qualified than their older peers. The exceptional fifteen year olds are denied the right to drive nonetheless. (I am grateful to Michael J. Klarman, Professor of Law and Class of 1966 Research Professor of Law, University of Virginia, for this example.) A person who is one tenth "black" may be able to reap the benefits of affirmative action even if in terms of discrimination suffered he is "white."

More obviously related to the religious/nonreligious dichotomy is the denial to political groups of certain benefits for which nonpolitical groups are eligible. Some groups with political agendas will qualify as nonpolitical, whereas some similarly situated organizations will qualify as political. For instance, an organization such as the League of Women Voters may fall into the nonpolitical category, whereas a league of voters for Candidate X may fall into the political category. Cf. Lehman v. City of Shaker Heights, 418 U.S. 298, 317 (1974) (Brennan, J., dissenting) (protesting the possibility that under the plurality's holding the League of Women Voters will be able to inform the public about an upcoming election while a political candidate will not); see infra text accompanying note 208. Yet despite the "borderlineness" problem, the Supreme Court has not shied away from building a legal regime that allows - even endorses - political/nonpolitical distinction. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Greer v. Spock, 424 U.S. 828 (1976); Broadrick v. Oklahoma, 413 U.S. 601 (1973); see also Smith v. Regents of the Univ. of Cal., 844 P.2d 500 (Cal.) (holding university funding of political or ideological organizations unconstitutional on First Amendment grounds), cert. denied, 114 S. Ct. 181 (1993). There is no obvious reason why separating political from nonpolitical organizations will involve more principled, less arbitrary decisionmaking than categorizing some groups as religious and others as nonreligious. For an elaboration of this argument, see infra Parts II and III.C. This point is bolstered by the threat of the Virginia Advocate - a conservative magazine at the University - to take legal action against the University when the University denied it SAF monies as a "political organization." See Nancy A. Youssef, Lawyers Assist in Funding Dispute, Cavalier Daily, Mar. 7, 1995, at 1. Just as Wide Awake can indignantly protest University funding of Jews and Muslims, so the Virginia Advocate can dispute the fairness of University subsidization of the Journal of Law and Politics. See supra note 16. (The University has since reversed its funding decision against the Virginia Advocate. Telephone Interview with Louise M. Dudley, Director of University Relations, University of Virginia (July 27, 1995).)

n23. Rosenberger, 795 F. Supp. at 181, 181 n.8.

n24. Rosenberger, 18 F.3d at 273-74.

n25. The named defendants are the Rector and Visitors of the University of Virginia and the Associate Dean of Students, see supra note 11, but for simplicity's sake this Note will refer to the defendants as the University.

n26. Rosenberger, 795 F. Supp. at 177-78. Wide Awake also alleged that the University had infringed its rights under various provisions of Virginia state law. Wide Awake's state law claims were scantly discussed at the district court level and given similarly cursory treatment at the circuit court level and by the Supreme Court. This Note follows the lead of these courts, leaving aside examination of Wide Awake's state law claims.

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B. The District Court

Wide Awake conceded the religious nature of its publication, but argued that the First and Fourteenth Amendments forbade the University from refusing to fund speech based on its content. n27 The University's defense was two-fold: first, the University characterized its decision to refuse to fund certain activities as a routine policy decision; second, the University invoked the Establishment Clause to justify its refusal to fund religious activities. n28 On the parties' cross motions for summary judgment, the district court disposed of Wide Awake's equal protection claim, its free exercise claim, and its free speech claim, finding for the University on all counts. n29

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n27. Brief for Plaintiff at 14, Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175 (W.D. Va. 1992) (No. 91-0036) [hereinafter Rosenberger Trial Brief].

n28. University Trial Brief, supra note 11, at 11-15.

n29. Rosenberger, 795 F. Supp. at 183-84. This Note focuses on the duties the Free Speech Clause imposes (or does not impose) on the government; hence, it addresses neither Wide Awake's free exercise claim nor its equal protection claim, except as the latter claim relates to Wide Awake's free speech claim. For the district court's resolution of the free exercise claim, see Rosenberger, 795 F. Supp. at 182-83 (holding that Wide Awake suffered no "burden of constitutional magnitude" to its free exercise rights and that even assuming a burden to Wide Awake, the state's interest in avoiding an Establishment Clause violation outweighed any such burden). For the district court's treatment of the equal protection claim, see id. at 183 (holding that fatal to its equal protection claim was Wide Awake's failure to adduce any evidence that invidious discrimination prompted the University to classify organizations such as the Muslim Students Association, the Jewish Law Students Association, and the C.S. Lewis Society as "cultural," and hence eligible for funding, and Wide Awake "religious," and hence ineligible for funding).

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Devoting the majority of its opinion to Wide Awake's free speech claim, the district court proceeded with its First Amendment analysis under the public forum doctrine. n30 Without inquiry as to the propriety or desirability of approaching Wide Awake's free speech claim from the perspective of the public forum doctrine, the district court assumed the doctrine's applicability. n31 Because public forum doctrine seeks to differentiate protection accorded speech depending on the geographic [*1672] location of the speech, n32 the threshold issue became whether the University's SAF scheme most closely fit the Court's definition of a traditional public forum, a limited public forum, or a nonpublic forum. n33 The district court found that the SAF scheme clearly did not constitute a traditional public forum n34 - a place historically dedicated to public debate. n35 The district court therefore confined its discussion to a review of limited public fora - property a state has voluntarily created and opened for communicative expression n36 - and nonpublic fora - property neither historically nor purposefully designed to facilitate public debate. n37

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n30. Rosenberger, 795 F. Supp. 176. See Tribe, supra note 5, 12-24, at 986-97, for a general overview of the public forum doctrine. For a historical survey of the doctrine, see Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Geoffrey R. Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233. Condemnation of the public forum doctrine finds shelter in legion academic commentaries. See, e.g., Daniel A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1222 (1984) (crediting public forum analysis with "producing fragmented Courts and incoherent opinions"); Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1715 (1987) (identifying the doctrine as a "serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property"). Notwithstanding academia's disaffection with the public forum doctrine, the doctrine's viability in First Amendment jurisprudence remains secure. See Farber & Nowak, supra, at 1221.

n31. Rosenberger, 795 F. Supp. 176. Whether public forum analysis provides the appropriate doctrinal hook for resolving First Amendment issues involving denials of access to government property in the form of funds, as opposed to space, was an open question at the time. The court of appeals suggested that public forum analysis should be confined to cases where access to "physical space" is demanded. Rosenberger, 18 F.3d at 287. The Supreme Court has now overruled the court of appeals on this issue, indicating a willingness to stretch the doctrine past this limited application. See Rosenberger, 115 S. Ct. at 2517 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 801 (1985) (applying a forum analysis to a charitable contribution program) and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983) (applying a forum analysis to a school mail system)); see also Carolyn Wiggin, Note, A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities, 103 Yale L.J. 2009, 2022-26 (1994) (arguing that mandatory student funding schemes at public universities are limited public forums and interpreting several lower court opinions as supporting this proposition). Notwithstanding the Court's assertion that the reasoning underlying the public forum doctrine applies to funding schemes,

Rosenberger, 115 S. Ct. at 2517, the Court's opinion in Rosenberger does not conform to the Court's analysis in traditional public forum doctrine cases. Hence, it may be too soon to declare the applicability of the public forum to funding cases. For an argument that the public forum doctrine has no application to a funding scheme as that in Rosenberger, see infra Section III.E.

n32. Restrictions on speech in a traditional or limited public forum generally must withstand far more rigorous scrutiny than the same restrictions imposed in a nonpublic forum. See Tribe, supra note 5, 12-24, at 987; Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985).

n33. Rosenberger, 795 F. Supp. at 176.

n34. See id. at 178 & n.6.

n35. Perry, 460 U.S. at 45-46 (defining traditional public fora as "places [such as sidewalks, streets, and parks,] which by long tradition or by government fiat have been devoted to assembly and debate"). Id. at 45. See also Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (defining traditional public fora as places which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

n36. Perry, 460 U.S. at 45-46.

n37. Id. at 46.

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In rejecting the contention that the University funding scheme was a limited public forum in favor of the conclusion that the funding scheme was a nonpublic forum, the district court relied heavily on Cornelius v. NAACP Legal Defense & Educational Fund n38 and Perry Educational Ass'n v. Perry Local Educators' Ass'n. n39 In Cornelius, the Court held that the government need not allow legal defense and political advocacy groups to participate in a charity drive aimed at federal employees. Concluding that the charity drive was a nonpublic forum, the Court underscored that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." n40 The Cornelius Court found pertinent several aspects of the government's policy: consistent practice, nonperfunctory requirements and comprehensive criteria reduced to writing. n41 Additionally, the Court considered the compatibility of the government property in question (the federal workplace) with unlimited access and the government's motivation (minimizing disruption) in limit- [*1673] ing access. n42 Further, the Court noted that alternative modes of communication were available to the excluded groups. n43 Largely the same factors drove the Court's analysis in Perry, where the Court resisted a union's claims that by allowing it and various other organizations to make use of a school's internal mail system the school had created a limited public forum and could not reverse its policy of allowing the union access to its mail boxes. n44

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n38. 473 U.S. 788 (1985).

n39. 460 U.S. 37 (1983).

n40. Cornelius, 473 U.S. at 802.

n41. Id. at 803-06.

n42. Id. at 805-09.

n43. Id. at 809.

n44. Perry, 460 U.S. at 44-55. The Court in Perry noted that the mail system's "normal and intended function ... is to facilitate internal communication of school-related matters to the teachers," id. at 46-47 (internal quotations omitted); it observed that the mail system had not been opened to the public, id. at 47; and it emphasized that permission to use the mail system was required. Id.

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The University had consistently distributed SAF monies to student groups on a selective basis; n45 in its Statement of Purpose, it had intentionally limited funding to activities that served its educational function (which did not necessarily translate into an effort to enhance the exchange of diverse viewpoints, as Wide Awake argued); n46 and the University had excluded religious groups and activities from its funding scheme for more than twenty years. n47 These factors led the district court to classify the SAF funding scheme as a nonpublic forum under Perry and Cornelius. n48 Without explaining the relevance of the difference, the district court contrasted its holding to Widmar v. Vincent, n49 where the Court held that a university had created a limited public forum by making meeting rooms accessible to a large variety of student organizations. n50

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n45. Rosenberger, 795 F. Supp. at 180-81.

n46. Id.

n47. Id. at 180.

n48. Id. at 180-81.

n49. 454 U.S. 263 (1981) (invalidating the exclusion of religious groups from the limited public forum). A more extensive discussion of Widmar appears in Section III.D.

n50. Rosenberger, 795 F. Supp. at 181.

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Resolution of the categorization question informed the remaining portion of the district court's opinion, because in a nonpublic forum content-based speech restrictions face a far less strenuous battle than they would otherwise

encounter. Whereas a restriction on access to a traditional or limited public forum is legitimate only if closely tailored and necessary to achieve a compelling state interest, for a state's restriction in a nonpublic forum to survive judicial scrutiny, it need only be reasonable and not an attempt to exclude a disfavored view. n51 In examining the reasonableness of the University's policy, the district court grasped as its talisman the [*1674] University's fear of violating the Establishment Clause. Wisely avoiding entry into the quagmire of Establishment Clause jurisprudence, n52 and evidently just as frightened of Lemon v. Kurtzman n53 as Justice Antonin Scalia and his little children, n54 the district court deftly left unanswered the question whether the University's interpretation of the Establishment Clause was correct. n55 Rather, the district court opined that, given the "obvious Establishment Clause issues" confronting it, the University acted reasonably in declining to fund religion. n56 The district court acknowledged that, apart from Establishment Clause concerns, to best advance its educational purpose the University would often be compelled to make content-based distinctions in allocating its limited resources. n57 Despite this careful concession, the district court pointedly declined to ground its holding on such a consideration. n58 Hence, just as the district court eluded the rigors of Establishment Clause analysis, so it escaped addressing the thorny free speech issue raised by the University's claim that its policy passed constitutional muster even assuming away the Establishment Clause issue. n59

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n51. Distinctions based on content and speaker identify are permissible in a nonpublic forum. Perry, 460 U.S. at 44-46, 49; see supra note 32.

n52. For exasperated indictments of the Court's unpredictable and unprincipled resolution of Establishment Clause cases, see, e.g., Jesse H. Choper, The Establishment Clause and Aid to Parochial Schools - An Update, 75 Cal. L. Rev. 5 (1987); William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986); Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1.

n53. 403 U.S. 602, 612-13 (1971) (articulating a three part test to assess a challenge to state action on Establishment Clause grounds: whether the action has a secular purpose; whether its principal or primary effect is to advance or inhibit religion; and whether the action fosters an excessive state entanglement with religion).

n54. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring in judgment) (likening Lemon to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, ... [only to] stalk our Establishment Clause jurisprudence once again, frightening ... little children").

n55. Rosenberger, 795 F. Supp. at 181.

n56. Id.

n57. Id. at 181-82.

n58. Id.

n59. Id. at 181.

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C. The Court of Appeals

In contrast, the Court of Appeals, all thoughts of restraint and diffidence aside and disdaining Justice Scalia's fear of the Lemon monster, n60 discerned in Rosenberger a full-fledged collision between the Establish- [*1675] ment Clause and the Free Speech Clause of the First Amendment. n61 Examining first Wide Awake's free speech claim, the Court of Appeals queried whether the University, "having chosen to promulgate guidelines governing the allocation of funds that support student speech among competing student interests, [could] ... condition funding awards on the content or viewpoint of a prospective recipient's speech." n62 Having thus framed the issue, the Court of Appeals easily bypassed public forum analysis n63 and resorted instead to the unconstitutional conditions doctrine to outline the limits of the University's discretion. n64 Briefly stated, the unconstitutional conditions doctrine casts a presumption of invalidity on state actions that "make enjoyment of a government benefit contingent on sacrifice of an independent constitutional right." n65 According to the [*1676] court of appeals, the University's policy, tantamount to a request that Wide Awake forsake its constitutionally protected religious expression in order to receive University grants, fell squarely in the category of cases forbidding state erection of "prior restraints." n66 This conclusion dictated strict scrutiny review, so that to forestall its policy's demise, the University had to articulate a compelling interest narrowly drawn to that end. n67 The Court of Appeals accepted as a sufficiently compelling interest the University's desire to abide by the strictures of the Establishment Clause if the desire was well-grounded legally. n68 To test the legal validity of the University's Establishment Clause defense, the Court of Appeals "[sought] enlightenment in the Supreme Court's Establishment Clause jurisprudence." n69 As most constitutional scholars (and many of the Justices themselves) would have warned, a venture into Supreme Court Establishment Clause jurisprudence for enlightenment is indeed a mission destined for failure. n70 The holding of the Court of Appeals illustrates this point nicely: the University could not fund Wide Awake without contravening the Establishment Clause, n71 so it was instead compelled to violate the Free Speech Clause. n72

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n60. Lamb's Chapel, 113 S. Ct. at 2150 (Scalia, J., concurring in judgment); Rosenberger, 18 F.3d at 282 n.30.

n61. Whereas the possibility of a clash between the Free Exercise Clause ("Congress shall make no law ... prohibiting the free exercise [of religion,]" U.S. Const. amend. I), and the Establishment Clause has received considerable attention from constitutional scholars, a hypothetical conflict between the Free Speech Clause and the Establishment Clause has been sparsely examined. See, e.g., Nadine Strossen, A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?, 71 Cornell L. Rev. 143 (1985); Nadine Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing

Curricular Decisions Affecting Students' Religious Freedom, 47 Ohio St. L.J. 333 (1986).

The focus of the Court of Appeals opinion in Rosenberger is on the issues implicating the Free Speech Clause and Establishment Clause. The Court of Appeals did not consider Wide Awake's state law claims and its free exercise claim because it found that Wide Awake had abandoned these claims by failing to contest the district court's ruling as to these claims. Rosenberger, 18 F.3d at 277 n.23. Similarly, the Court of Appeals found that through procedural default Wide Awake had abandoned its claim that the University had applied its guidelines in a less than even-handed manner and hence refused to consider this claim. Id. at 288. Nor did the Court of Appeals discuss Wide Awake's claim that the University guidelines were facially infirm under the Equal Protection Clause, holding that its response to Wide Awake's free speech claim sufficed to dispose of this claim as well. Id.

n62. Rosenberger, 18 F.3d 279.

n63. Id. at 287.

n64. Id. at 279.

n65. Id at 279-81 (citing FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (invalidating on First Amendment grounds congressional effort to fund only noncommercial television and radio stations that did not engage in editorializing); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating that a state college could not refuse to rehire a professor for exercising his First Amendment free speech rights by criticizing the administration); Sherbert v. Verner, 374 U.S. 398, 405 (1963) (refusing to allow a state to deny an employee unemployment compensation when to do so would burden her constitutional rights under the Free Exercise Clause); Speiser v. Randall, 357 U.S. 513, 518 (1958) (finding a violation of the Free Speech Clause in a statute containing a tax exemption open only to those who did not advocate violent overthrow of the government)). Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), has limited Sindermann somewhat, but this is of no consequence for the purposes of this Note.

n66. Rosenberger, 18 F.3d at 281. For a discussion of prior restraints, see Tribe, supra note 5, 12-34, at 1039-42.

n67. Id. at 281; see supra note 51 and accompanying text (defining strict scrutiny in the context of a traditional or limited public forum, which is the same standard that applies in the case of prior restraints).

n68. Rosenberger, 18 F.3d at 282 (relying on dictum in Widmar v. Vincent, 454 U.S. 263, 271 (1981)).

n69. Id. at 282.

n70. Lamb's Chapel, 113 S. Ct. at 2149-50 (Scalia, J., concurring in judgment).

n71. Strangely, to determine "whether awarding SAF monies to ... Wide Awake ... would constitute an "establishment of religion' at the University," Rosenberger, 18 F.3d at 282-83, the Court of Appeals answered the question

whether the University's policy of not funding Wide Awake contravened the Establishment Clause. Id. Later language makes almost unmistakably clear, however, that funding Wide Awake would constitute an establishment of religion at the University in the court of appeals' view. Id. at 281-87 (explaining that "because the First Amendment forbids government to promulgate policies "respecting an establishment of religion,' government is left no choice but to forswear financial support of the myriad forms of religious endeavor in which a student organization might engage.") Id. at 287 (citations omitted).

n72. Id. at 287.

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D. The Worst of the Court of Appeals

In an unfortunately vague, scattered opinion (discussed in more detail below), n73 Justice Anthony M. Kennedy spoke for the majority of the [*1677] Court. n74 Without even a perfunctory reference to Lemon, the Court navigated its way through Establishment Clause jurisprudence by refusing to navigate its way through Establishment Clause jurisprudence. (Is the Lemon beast to be silently slayed?) Focusing on the need for neutrality, contrasting student fees and taxes, and invoking the specter of censorship, the Court declined to see danger of an Establishment Clause violation. (Given the state of the law in this area, the view is in the eye of the beholder.) n75 In contrast, Justice David H. Souter's dissent, like the opinion of the Court of Appeals, argued that "the University's refusal to support [Wide Awake's] religious activities is compelled by the Establishment Clause." n76

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n73. See infra Parts II and III.

n74. Chief Justice William H. Rehnquist and Justices Antonin Scalia, Sandra Day O'Connor, and Clarence Thomas joined the majority opinion. Justices Thomas and O'Connor authored separate concurring opinions. Justice David H. Souter filed a dissent in which Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen G. Breyer joined.

n75. Rosenberger, 115 S. Ct. at 2520-25.

n76. Id. at 2533. This Note focuses on the Free Speech Clause of the First Amendment and so discusses neither the majority's nor the dissent's Establishment Clause analysis in any detail. Both Justice O'Connor and Justice Thomas, in their respective concurrences, also focused on the Establishment Clause. Justice Thomas sketched a historical survey in support of the majority's Establishment Clause analysis. Id. at 2528. Justice O'Connor offered a narrower version of the Court's opinion, emphasizing that the facts of Rosenberger present no danger of impermissible religious endorsement. Id. at 2525.

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As a secondary matter, the dissent contended that the University's funding scheme does not infringe Wide Awake's constitutional free speech rights. In contrast, the majority agreed with the court of appeals that the University's

policy violates the Free Speech Clause. Making no mention of the unconstitutional conditions doctrine, the majority defined the crucial issue as the "distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of [the government's] limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." n77 The Court asserted - substituting case law citation for explanation - that the University's funding scheme "is a forum [albeit] in a more metaphysical than in a spatial or geographic sense." n78 Without further ado, the Court found that the University had engaged in unconstitutional viewpoint discrimination by prohibiting "religious editorial viewpoints" under Lamb's Chapel v. [*1678] Center Moriches Union Free School District, n79 which described religion as a viewpoint. Dispensing along the way with the contrary arguments the University had advanced, n80 the majority concluded its discussion of the free speech issue with a rhetorical flourish: the University's regulations strictly applied would exclude all of Plato's works unless he "could contrive ... to submit an acceptable essay on making pasta or peanut butter cookies"! n81

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n77. Id. at 2517.

n78. Id. (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) and Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983)).

n79. Id. at 2518 (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2145 (1993) (describing religion as a viewpoint). For an extensive discussion of Lamb's Chapel, see infra Subsection III.C.4.

n80. For a discussion of the Court's dispensation of these arguments, see infra Parts II and III.

n81. Rosenberger, 115 S. Ct. 2520.

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The project of Part II is to demonstrate that the Court's holding, not the University's regulations, will more likely encourage university financed pasta or peanut butter cookie recipes. Part II concentrates on the normative argument that the dissent's and Court of Appeals' focus on the Establishment Clause is counterproductive because it implies that without the Establishment Clause, the University would have no choice but to fund speech, regardless of its content. Part III takes up the legal argument that the Court of Appeals could have upheld the University's content-based distinction without reference to the Establishment Clause and that under relevant precedent the Supreme Court should have affirmed the Court of Appeals even if the Establishment Clause would not be violated by University funding of religious activities. In other words, Part III hopes to persuade that sound legal resolution of Rosenberger dictated a holding that the University could exclude all religious activities from its funding scheme without violating the First Amendment Free Speech Clause.

II. The Intersection of Practicality and Philosophy

A. The Argument from Practicality: Whither the Spirit of Footnote27?

Provoking is footnote 27 of the Court of Appeals' opinion; its implications, taken to their logical extreme in the context of the Court of Appeals' reasoning, unravel any policy argument for withholding funds from a religious organization only because to grant them would violate the Establishment Clause. Neither feasibility nor consistency allow such a position to stand upright. n82

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n82. But cf. Recent Case, Free Speech and Press Clause and Establishment Clause - Student Activities Funds - Fourth Circuit Upholds University's Refusal to Consider Religious Organizations For Student Activities Funding, 108 Harv. L. Rev. 507 (1994) (supporting the court of appeals' mode of analysis and agreeing with the Court of Appeals that the University had violated the Free Speech Clause, but disagreeing that the Establishment Clause justified the University's policy under Widmar, 454 U.S. 263); James M. Henderson, Jr., Symposium, How Much God in the Schools?, 4 Wm. & Mary Bill Rts. J. 351 (1995) (criticizing the Court of Appeals' Establishment analysis).

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[*1679]

Footnote 27 is amenable to two depictions: first, it can be described as a straightforward compliance with Ashwander n83 principles and the constitutional requirement that Article III courts are vested only with jurisdiction to decide concrete cases or controversies; n84 second, the footnote can be viewed as a magnificent ducking exercise, by which the Court of Appeals attempted to tuck away from sight the core problem presented in Rosenberger. A close look shows footnote 27 to be a duck, following the Ashwander flock incognito.

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n83. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (warning against "formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (internal quotations omitted); see also Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945) (speaking of the Court's refusal "to decide abstract, hypothetical or contingent questions, ... or to decide any constitutional question in advance of the necessity for its decision") (citations omitted).

n84. U.S. Const. art. III, 2.

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The footnote reads: "We do not address the [University] guidelines' prohibition of SAF funding for such organizations as fraternities and sororities[, exclusionary and political groups] or for such activities as social entertainment[, honoraria,] or philanthropic contributions. Those excluded

categories are not at issue in the instant case." n85 Literally both of the footnote's claims are no doubt accurate: the Court of Appeals nowhere in its opinion states that the Free Speech Clause precludes the University from discriminating in its funding scheme against the other organizations the University excludes from receiving SAF monies; similarly, in a formalistic sense, the University's refusal to fund organizations other than those religious in nature is not directly implicated by Wide Awake's complaint.

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n85. Rosenberger, 18 F.3d at 281 n.27.

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Beyond this highly technical, narrow view lies the reality that the Court of Appeals' analysis leads ineluctably to the conclusion that in allocating SAF monies the University cannot deny funding to any category of groups or activities unless they involve speech accorded low value under the First Amendment. n86 That Wide Awake's speech is of a religious [*1680] nature played no role in the Court of Appeals' determination that the University had infringed Wide Awake's First Amendment rights once the Court of Appeals found that religious speech fell outside the tight category speech accorded little (if any) protection under the First Amendment. Rather, the Court of Appeals stated broadly that "although government need not subsidize exercise of a constitutional right,[n87] the lack of an affirmative duty of financial support does not mean that government may, in general, penalize exercise of constitutional rights by withholding from their possessors an otherwise discretionary benefit." n88 Under such a principle, the University must also fund sororities, fraternities, charities, politics, and exclusionary groups and activities. n89 Thus, the true character of footnote 27 reveals itself. n90

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n86. As reinterpreted in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), speech accorded low value under the First Amendment includes only obscenity, Roth v. United States, 354 U.S. 476 (1957), defamation, Beauharnais v. Illinois, 343 U.S. 250 (1952), and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The First Amendment also gives less protection to commercial speech than to noncommercial speech. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980); see also R.A.V., 112 S. Ct. at 2564 ("[The Court's] First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.") (Stevens, J., concurring in judgment).

n87. Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

n88. Id. at 281. For an examination of this statement's legal merit in the context of Rosenberger, see infra Part III.F.

n89. See Brief for Respondent at *12-13, Rosenberger v. Rector & Visitors of the Univ. of Va., 1994 WL 704081 (U.S. 1994) (No. 94-329) [hereinafter

University S. Ct. Brief]; University Trial Brief, supra note 11, at 14-15, Rosenberger, 795 F. Supp. 175 (W.D. Va. 1992) (No. 91-0036) (reassuring the University that "there are independent, lawful and constitutional constraints on [the University's] funding practices[: the University] does not have to fund libelous speech[; it] does not have to fund obscene speech[; and it] does not have to fund criminal speech, such as mail fraud").

n90. The district court's holding leads to the same result as does footnote 27, since the district court too excuses the University from funding religion on Establishment Clause grounds, Rosenberger, 795 F. Supp. at 181. Unlike the Court of Appeals opinion, however, the district court opinion leaves room for the possibility that the University's policy would survive judicial review even without the religious element. Id.

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The Supreme Court has its own version of footnote 27. Like the Court of Appeals' unconstitutional conditions analysis, the majority's viewpoint analysis leaves little, if any, room for distinguishing content distinctions based on the charitable, fraternal, or political character of speech from content distinctions based on religion. n91 The majority offers a weak attempt, devoting only a few lines to the effort. Evidently seeing no need to address the University's exclusion of any activities but those political in nature, the Court paused on the University's refusal to fund political groups.

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n91. For an argument that the Court has declined to define politics as a viewpoint and thus should not define religion as a viewpoint unless it can articulate a meaningful distinction between the two, see infra Part III.

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[*1681]

The prohibition on "political activities" is defined so that it is limited to electioneering and lobbying. The Guidelines provide that "these restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which ... espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." A "religious activity," by contrast, is defined as any activity that "primarily promotes or manifests a particular "belief in or about a deity or an ultimate reality." n92

With this, the Court implicitly concedes the extensive implications of its holding, as far-reaching as the Court of Appeals' unconstitutional conditions reasoning. By purporting to contrast SAF's ban on politics and its ban on religion, the Court's opinion gives rise to the inference that if the distinction between the University's definition of politics and its definition of religion was absent, the denial of public funds to political groups would fall with the religion-based exclusion. But the difference between the two definitions is a distinction in form only. After all, surely the Court does not mean to suggest that if the University attached to its definition of religion appropriate words of caution - such as "we do not intend to preclude funding of any otherwise eligible organizations' and "we do not wish to disqualify groups only because they espouse unpopular viewpoints' - the Court would reverse

itself in Rosenberger. (The University could easily comply with such a command, as nothing in the University's definition of religion contradicts the cautionary words.) Moreover, the Court seems to suggest that were the University's regulations broader than a mere exclusion of lobbying and electioneering, they would be called into question under the Free Speech Clause as wrongful discrimination against the "political viewpoint." The dissent draws the mirror image of the majority's distinction in the religious context, arguing that the University's regulations "by their application to Wide Awake, ... simply deny funding for hortatory speech ... [or] the entire subject matter of religious apologetics." n93 So the dissent draws an expedient, but ultimately dishonest, characterization of the guidelines. True, the guidelines probably would not prohibit "writing that merely happens to express views that a given religion might approve, or simply descriptive writing informing a reader about the position of a given religion." n94 But, as in Lamb's Chapel, neither would the guidelines likely permit a "Chris- [*1682] tian perspective" on a given subject (in that case family values). n95 Accordingly, the University refused to subsidize Wide Awake's religious views on, inter alia, homosexuality and pregnancy. n96 Just as the majority, the dissent implies that a broader exclusion (not just proselytization, but all religious speech), would fail under the First Amendment. Neither the majority nor the dissent explains why the less broad exclusion - on lobbying and electioneering or evangelism - does not constitute viewpoint-based discrimination, whereas the more broad exclusion - all political or religious speech - would.

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n92. Rosenberger, 115 S. Ct. 2514-15 (citations omitted); Rosenberger v. Rector & Visitors of Univ. of Va., No. 94-329, 1995 WL 117631, at *5, 27 (U.S. Mar. 1, 1995) (oral argument).

n93. Rosenberger, 115 S. Ct. 2549.

n94. Id. at 2550

n95. Id.

n96. Id. at 2515.

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In any case, the Court casts into doubt content-based distinctions generally, with its uncomfortably broad definition of viewpoint that "eviscerates the line between viewpoint and content." n97 This merger of content and viewpoint discrimination invites a speaker on a given topic to claim the topic is actually a viewpoint on a different topic. With little lost in the translation, an individual that wishes to proselytize can avoid exclusion from a debate confined to a given subject simply by asserting that he would like to talk about the given subject, only from a "proselytizing perspective." For instance if the discourse centers around child rearing, the religious speaker may use the forum to urge church attendance (by children). n98 To exclude such a speaker from the dialogue would then (under the Court's definition) constitute discrimination against the so-called religious viewpoint on the subject of child rearing. The same game can be played with politics. If religion and politics constitute viewpoints, why not a "charitable viewpoint," a "fraternal viewpoint," and an "exclusionary viewpoint"? And how might a university

justify excluding the "cooking viewpoint" by declining to subsidize essays on culinary education (essays on "making pasta or peanut butter cookies")?

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n97. Id. at 2550. For further discussion on this point, see infra Part III.

n98. See Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147 (1993) (holding that a religious standpoint on family issues and child rearing must be allowed if all other views are permitted).

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In practical terms, adherence to the implicit command of footnote 27, in spirit if not in form, contained in the Court's opinion, would translate into a tremendous defeat for education. No longer would universities be able to allocate resources to their best value educational use among competing student groups. n99 Rather than exercise the discretion to which the [*1683] Court has recognized universities are entitled, n100 universities would be tied to some type of mechanical formula in allocating funds to student groups. The Court in Rosenberger confirms this conclusion: it is "incumbent on the State, of course, to ration ... scarce resources on some acceptable neutral principle." n101 The term "ration" informs the debate at issue. For instance, the University's criterion that awards funds to an eligible group based on the benefits the University derives from the group n102 is but a variant of the University's policy to restrict funding only to groups that further its educational purpose; n103 the cost/benefit calculus in the latter case merely is made on a general as opposed to an individual basis. To take one example, if the University could not ban all political organizations from the funding scheme at once, it could hypothetically achieve the same result by allowing political organizations to submit applications and performing a cost/benefit assessment for each political organization, always with the same result, a denial of funding. The cost/benefit assessors could discharge their duty in a nonperfunctory manner, still rejecting all political applicants, but by considering each application anew. Presumably this type of policy, a mere change in form but not in substance from the proscribed exclusions, would fail under judicial scrutiny. n104 Hence, the utility of substantive criteria would be sharply curtailed: the criteria would have to be employed in a way that would force the evaluators to disregard the criteria when they most strongly applied, i.e., when the applicant was least likely in the judgment of the evaluators to contribute meaningfully to the University's educational ideals. n105 This would mirror a situation where instead of being able to inform a museum tour guide of a dislike for impressionist work, a visitor to a museum [*1684] would have to list the artists one by one: Pierre Auguste Renoir, Claude Monet, Edouard Manet, etc. n106 But if all impressionists found a place on the list, the resulting exclusion would be illegitimate. With time denying an opportunity to explore the museum in its entirety, artificial criteria would determine which paintings the visitor would view. For instance, deciding based on whether the floor number containing the paintings was odd or even in number would not place too much discretion with the viewer, unless of course all impressionist paintings covered the wall of an odd or even numbered floor. Considering merit but not content would be similarly crippling for the University: n107 alone remaining as mechanisms for allocating University funds would be the two rather ancillary standards currently used as supplements by the University - group size and group resources. n108

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n99. See University S. Ct. Brief, supra note 89, at 12-26 (providing various examples of routine academic and other governmental decisions - research, curriculum, and faculty selection, for instance - whose validity would be put into doubt by footnote 27). For the position that content-based distinctions are a necessary component of university governance, see Elizabeth E. Gordon, Comment, University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy Doctrines, 1991 U. Chi. Legal F. 393; Christina E. Wells, Comment, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U. Chi. L. Rev. 363, 394-95 (1988).

n100. The argument is a familiar one:

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of [the] Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.

Widmar, 454 U.S. at 268 n.5.

n101. Rosenberger, 115 S. Ct. 2519 (emphasis added).

n102. See supra note 15 and accompanying text.

n103. See supra note 7 and accompanying text.

n104. Cf. Perry v. Sindermann, 408 U.S. 593, 597 (1972) (explaining that the government cannot "produce [indirectly] a result which [it] could not command directly") (internal quotations omitted).

n105. This assumes that those groups whose applications the University has currently denied even preliminary review are by nature groups that the University believes are least necessary to its educational function.

n106. For obvious reasons the analogy is not a perfect one; it is used only to underscore an isolated point.

n107. A blanket statement to the effect that the University can consider substance as long as it refrains from discriminating against certain groups is, without more, a non sequitur. As the discussion above argues, consideration of substance cannot go forth without discrimination (stripped of its pejorative connotations). For a discussion of permissible discrimination in the University context, see infra Part III.B.

n108. See supra note 15.

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Assuming that the University's governing board, n109 prior to judicial intervention, had achieved a distribution of SAF monies among student groups that accurately reflected different groups' educational contributions to the University n110 (assuming adequate job performance), n111 the forced change in

funding allocation would dilute the strength of the University's educational program (and have similar effects on other public institutions affected by the court of appeals' pronouncement). n112 The strength of this effect may be particularly great if the groups currently excluded from the SAF scheme have many members and participate [*1685] intensely in extracurricular activities; some excluded University groups, like political and religious organizations, might be especially heavily involved in promoting their groups' causes. n113 Thus, by whatever amount, the attractiveness of the University and other public universities vis-a-vis private universities would decline. n114 Furthermore, within the University setting, there will be a diminution of student participation in educational extracurricular activities at the margin: to some extent, students previously induced to participate in educational extracurricular activities by the incentive of funding will focus their energies elsewhere. n115 Additionally, with enough demands for funds from qualifying groups, monies may be spread so thinly amongst groups as to be of insignificant value to any individual group. This discussion proceeds on the assumption that the University eventually will not disband the SAF. The consequences for extracurricular funding may be even more drastic if the University exercises its right to decline to subsidize all CIOs rather than acquiesce in a judiciary remake of its funding policy: n116 the paradoxical result would be a suppression of speech under the aegis of the First Amendment. n117

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n109. "Governing board" in this context refers to the Rector and Visitors and anyone to whom they have delegated authority.

n110. The reference here is to the University's determination that the educational contributions of religious, political, social, philanthropic, and certain other groups were not so significant as to warrant funding.

n111. There is no indication that there was a misallocation of funds to groups (i.e., that, ceteris paribus, groups whose contribution to education was greater than average received less monies than average). Resource mismanagement would present an entirely different problem, one for the University community, and not the judiciary, to solve.

n112. If the University does not increase the size of the SAF, the University will have to funnel monies away from groups high in educational value to groups low in educational value. By no means does this Note suggest that religious groups (or other groups to which this Note refers) are inherently of low value to education; instead, the thrust of this Note is that determining what is of low educational value is a project for institutions of learning, as opposed to a project for a learned institution (the judiciary).

n113. The question is an empirical one. This notwithstanding, the hypothesis that Christian proselytizers engage vigorously in their mission is not an entirely misconceived notion.

n114. Private colleges, as private actors, are not bound by the First Amendment as state actors are under the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 17 (1883).

n115. Michael W. McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv. L. Rev. 989, 1001-02 (1991).

n116. Rosenberger, 18 F.3d at 278-79; Rosenberger, 115 S. Ct. at 2516 (stating that "there is no question that the [government], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated") (citations omitted). Although the University currently plans to continue with the SAF, it anticipates modifying the funding scheme to include funding for religious activities. Luba Shur, Telephone Interview with Patricia M. Lampkin, Associate Dean of Students, University of Virginia (August 24, 1995). Potential lawsuits, however, by students unwilling to pay for speech they find offensive could lead to a dissolution of the SAF. See, e.g., Rosenberger, 115 S. Ct. at 2527 (O'Connor, J., concurring) ("Finally, although the question is not presented here, I note the possibility that the student fee is susceptible a Free Speech challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees.") (citations omitted).

n117. See Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 Sup. Ct. Rev. 29, 72; Gordon, Comment, supra note 99, at 396 (citing David L. Meabon, Robert E. Alexander and Katherine E. Hunter, Student Activity Fees 19-33 (1979)).

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Not only is the feasibility of funding all CIOs questionable, but the command that monies to all student groups n118 be provided on demand is [*1686] completely inconsistent with generally accepted principles of governance. n119 To capture fully the import of the incongruity, a review of Justice John Paul Stevens' iteration of the obvious is in order:

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n118. The University routinely awards CIO status; "CIO" in essence translates into "any student group." See supra notes 9-10 and accompanying text.

n119. The comparison to content-based distinctions in areas outside of universities is discussed infra, Part III.F.

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In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities. n120

Hence, in most areas of university management, a university accepts and rejects desirable and undesirable materials for instruction, based at least in part on their content. With this responsibility comes the power (or the need) to draw arbitrary lines. n121 Worries that the University's prohibitions, along with religious proselytizers, would disqualify "Plato, Spinoza, ... Decartes[,] ... Karl Marx, Bertrand Russell, and Jean-Paul Sartre" n122 are but a variation of

the desire to avoid drawing clear lines where ambiguity persists. A hybrid of philosophy, religion, and literature may ultimately fall into the class of historical texts; n123 an engineering department, rather than its physics counterpart, may win a government grant for its more obvious, but not necessarily more valuable, contributions to defense research; Third Wave feminists deriding Christianity as a patriarchal prop n124 and philosophers chanting Nietzsche's famous pronouncement [*1687] that "God is dead" n125 may be aggressively recruited by a university at the expense of traditional biblical scholars. n126 And a Jewish or Islamic organization labeled "cultural," may obtain funds, whereas an evangelical magazine, classified "religious," may get nothing. n127 But the wisdom of such line drawing is not a question upon which courts commonly pass in the context of " "who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " n128 Unless student activities funds differ in some important respect from all other aspects of university business, they should receive no special treatment from the judiciary; n129 if a university need not resort to the Establishment Clause to defend its decision to pass over the putative biblical scholar to explore political theory instead, n130 then neither should a university have to do so when student activities fees are in dispute. The thrust of this discussion is that the "obvious Establishment Clause issues" n131 discerned first by the district court, then the Court of Appeals, the concurrences, and the dissent are not at all obvious; more accurately, the religious nature of the organization challenging the SAF is auxiliary to the question Rosenberger asks: Should the First Amendment serve as an instrument for disgruntled losers in the political process? n132

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n120. Widmar v. Vincent, 454 U.S. 263, 278 (1981) (Stevens, J., concurring in judgment); For a wonderful defense - featuring Mickey Mouse and Hamlet - of the proposition that it is "both necessary and appropriate ... to evaluate the content of a proposed student activity," see id. See also Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 230 (1985) ("Judicial review of academic decisions ... is rarely appropriate, particularly where orderly administrative procedures are [followed] ...."); (Powell, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J., concurring in the judgment) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.").

n121. See infra note 135.

n122. Rosenberger, 115 S. Ct. at 2520.

n123. For instance, the University has adjudged C.S. Lewis books cultural as opposed to religious. See supra note 29.

n124. See, e.g., Angela L. Padilla & Jennifer J. Winrich, Christianity, Feminism, and the Law, 1 Colum. J. Gender & L. 67 (1991).

n125. Friedrich Wilhem Nietzsche, The Gay Science 167 (Walter A. Kaufmann trans. 1974) (1887).

n126. See J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L. J. 251, 308 (1989).

n127. Cf. infra Part III.C (discussing generally whether such a policy amounts to viewpoint discrimination). Again, if demonstrable discrimination against Christians exists, the group has an equal protection claim against the University. See supra note 22.

n128. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (summarizing the so-called " "four essential freedoms' of a university," (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)) (citations omitted)). The Court has recognized that the judiciary is "far less ... suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions - decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.' " Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (quoting Board of Curators v. Horowitz, 435 U.S. 78, 89-90 (1978)).

n129. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267-70 (1988) (finding publication of a student newspaper to be part of the regular class curriculum and naming among the pertinent factors the school's stated policy that the newspaper was to serve educational purposes).

n130. See supra note 128. There is some tension between "autonomous decisionmaking by the academy itself" and "academic freedom." Ewing, 474 U.S. at 226 n.12, The tension, however, is best seen as a Perry v. Sindermann, 408 U.S. 593 (1972), problem, or a viewpoint discrimination problem, see infra Part III.C, rather than the problem Rosenberger presents.

n131. Rosenberger, 795 F. Supp. at 181; see supra text accompanying note 56.

n132. See infra note 137.

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[*1688]

B. Philosophical (Not Metaphysical) n133 Considerations: The (Unlikely) Marriage of Stanley Fish and RobertBork n134

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n133. See Richard Rorty, Contingency, Irony, and Solidarity (1989) (building a road leading away from the metaphysical dead end).

n134. The philosophical arguments of Part II.B could be read to apply equally to all content-based discrimination, including viewpoint-based discrimination, assuming a distinction between discrimination types exists. Part II.B does not undertake the task of distinguishing viewpoint-based discrimination from other types of discrimination, although no doubt an evisceration of the difference between discrimination types could be accomplished with one metaphysical stroke. See infra Section III.C. First, the Court, the final arbiter of meaning, has recognized a distinction between viewpoint-based discrimination and other content-based discrimination. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2569 (1992) ("In general, viewpoint-based restrictions on expression require greater scrutiny than [other] restrictions.") (Stevens, J., concurring in

judgment); supra Section I.A. Second, unlike with other content-based discrimination, see infra Section III.A, the Court's rhetoric matches result; the Court mercilessly strikes down what it considers to be viewpoint-based distinctions. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (holding that even if the government can prohibit all fighting words, it cannot take sides in a debate by singling out a select category of fighting words for disfavored treatment); see infra Subsection III.C.3. Viewpoint-based discrimination is generally (not always) considered the most invidious discrimination. See Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 108 (1978).

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Robert Bork (admittedly with a starkly different agenda) argues along the following lines:

Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate. n135

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n135. Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 28 (1971) (contemplating a regime in which the First Amendment protects only political speech). But cf. Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (stating that a university is not competent to draw lines that separate religious organizations from their secular counterparts to enforce a policy of no access to religious groups). This Note leaves a struggle with Lemon for the more hardy. This Note does state, however, that the government routinely defines groups as religious/nonreligious and allocates funds accordingly. See University S. Ct. Brief, supra note 89, at 23-30 (giving examples of government programs that exclude religion, such as fellowships and grants to public broadcasters); cf. Greer v. Spock, 424 U.S. 828 (1976) (allowing a military commander to decide whether a given activity is political and whether given political literature is dangerous).

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[*1689]

Contrary to Bork, many commentators advance several arguments in support of the position that the First Amendment should often constrain the majority when free speech values are at stake. n136 The theme running through these arguments most pertinent to Rosenberger is that government should not skew the marketplace of ideas through selective subsidization. n137 Under this theory, by subsidizing a motley assortment of [*1690] organizations that engage in speech on the University campus, n138 but excluding (through nonsubsidization) from this

multifarious dialogue, inter alia, religious groups, the University distorts debate.

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n136. A good portion of First Amendment literature is dedicated to justifying the First Amendment's free speech ideals, not all of it favoring broader, as opposed to narrower, protection of speech. The valuable contributions are too many to catalogue in full. See generally, Tribe, supra note 5, 12-1, at 785-89; Lee Bolinger, The Tolerant Society (1986); Ronald Dworkin, Taking Rights Seriously (1977); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Frederick Schauer, Free Speech: A Philosophical Enquiry (1982); C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978); Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521; Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191; Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974); Thomas Scanlon, A Theory of Free Expression, 1 Phil. & Pub. Aff. 204 (1972); Frederick Schauer, Must Speech Be Special?, 78 Nw. U. L. Rev. 1284 (1983); Frederick Schauer, The Role of the People in First Amendment Theory, 74 Cal. L. Rev. 761 (1986); Harry H. Wellington, On Freedom of Expression, 88 Yale L.J. 1105 (1979); Mark G. Yudof, When Government Speaks: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863 (1979). A comprehensive overview of these scholarly works is fully beyond the scope of this Note. For the purposes of this Note, it is sufficient to mention only oft cited values associated with free speech, such as "search for truth," "self-governance," and "self-fulfillment." See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 193 (1983); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46 (1987).

n137. Like the Mona Lisa, Justice Oliver Wendell Holmes' version of the marketplace of ideas has not gathered dust; like the painting, its vision withstands persistent reproductions:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution....

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

For one of many discussions on how the government skews the marketplace of ideas through selective subsidization, see David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675 (1992) (arguing, inter alia, that the Court relies on the free marketplace of ideas theory to justify limiting government restrictions on speech in the university setting). Id. at 723-31. For criticism of the

premises underlying the marketplace of ideas theory, see Baker, supra note 136; Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1. One possible conclusion to draw from Professor Ingber's and Professor Baker's critiques is that government nonintervention may not be the optimal free speech solution given a distorted marketplace. See Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781 (1987); Cass Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255 (1992). For a confrontation of the same problem in the sphere of public finance economics, see R.G. Lipsey & R. Kelvin Lancaster, The General Theory of Second Best, 24 Rev. Econ. Stud. 11 (1956). For an argument that, as interpreted, the Constitution itself skews the free marketplace of ideas by allowing the Court's judgment to supplant the product of the free marketplace of ideas, see John Hart Ely, Democracy and Distrust (1980) (arguing that when there is a defect in the functioning of the free marketplace of ideas (in Ely's words, political process) justification for Court intervention exists). Time permits but the briefest tarry into philosophical inquiry; this Note's cursory review focuses only on one isolated problem with the free marketplace of ideas theory, and the aforementioned scholarly works are proffered only to highlight the general complexity facing both the supporters and detractors of the free marketplace of ideas theory.

n138. See supra note 17.

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Assuming the University's subsidy policies have influenced the relative amount of speech in which various student organizations engage, the question then becomes why this ostensibly malign story cannot be a benign story. While pressing for regulation of hate speech, Stanley Fish provides a rejoinder to the question:

... Could it be the purpose of [colleges and universities] to encourage free expression? If the answer were "yes," it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines, or libraries, since freedom of expression requires nothing but a soapbox or an open telephone line. The very fact of the university's machinery - of the events, rituals, and procedures that fill its calendar - argues for some other, more substantive purpose....

....

... When the First Amendment is successfully invoked [to foil a university policy] the result is not a victory for free speech in the face of a challenge from politics but a political victory won by the party that has managed to wrap its agenda in the mantle of free speech. n139

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n139. Stanley Fish, There's No Such Thing as Free Speech 107-10 (1994) (emphasis omitted).

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... [This is because] decisions about what is and is not protected in the realm of expression will rest not on principle or firm doc- [*1691] trine but on the ability of some persons to interpret - recharacterize or rewrite - principle and doctrine in ways that lead to the protection of speech they want heard n140

So the benign story can be told: just as society defines what is (valuable) speech, n141 the University decides what is valuable speech. n142 Both of these judgments may be "wrong"; neither policy fully guards speech. According to the Bork-Fish thought union, that the University's decision differs from society's definition need not be an invitation for First Amendment intervention. n143 The University's task, maneuvering skillfully Bork's "close cases," n144 is to distort debate. n145 The phrase "distort debate" reverberates unpleasantly, but actually is far less ominous than both the Lemon beast and undisciplined resource allocation. n146 In the sense here used it encompasses neither "casting a pall of orthodoxy over the classroom" n147 nor indoctrinating the student body. n148 It is no different from a university channeling students toward the study of Greek mythology but away from engaging in Greek festivities; whether a university unconstitutionally discriminates between viewpoints on the subject of Dionysus n149 by its channeling actions is a question that occupies Part III, as it explores the bounds of permissible content-based distinctions under the First Amendment. Part III discovers that, notwithstanding the [*1692] Court's holding in Rosenberger, the idea that universities exist to educate their students - not just to promote more and more speech, however useless it may be - is not so radical, and that universities must often draw arbitrary lines to determine what is of educational value or what speech is useful. Nor is the marriage of Stanley Fish and Robert Bork a truly radical thought union; it finds its seeds in the writings of Justice Oliver Wendell Holmes:

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n140. Id. at 110.

n141. Inter alia, obscenity, defamation, and fighting words do not qualify. See supra note 86.

n142. Inter alia, religious, political, and exclusionary groups do not qualify. See supra text accompanying notes 13-14.

n143. Fish declares that usually in universities "the flourishing of free expression will in almost all circumstances be an obvious good." Fish, supra note 139, at 107. Having explained that there is no such thing as free speech, that "like expression, freedom is a coherent notion only in relation to a goal or good that limits and, by limiting, shapes its exercise," id. at 108, the assertion regarding the values of free expression is hard to take at face value. It becomes easier to accept if it is understood as a shorthand way of arguing that universities function best when many worthy views are expressed; such an interpretation explains why Fish answers in the negative the query he puts forth: "Could it be the purpose of [universities and colleges] to encourage free expression?" Id. at 107.

n144. Bork, supra note 135.

n145. In Bork's terminology "the general location of the cut is justified," id.; cf. Fish, supra note 139, at 111 (recommending for university

administrators a balancing test as a means of determining which (hate) speech to "tolerate[] or regulate[]"). See infra Part III for the crucial distinction between content-based discrimination and viewpoint-based discrimination.

n146. Supra notes 53-55, 60.

n147. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1966).

n148. See Yudof, supra note 136, at 876-77.

n149. Dionysus is the Greek god of wine and orgiastic religion. Edith Hamilton, Mythology 54-62 (1940).

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Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types. n150

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n150. Irwing v. Gavit, 268 U.S. 161, 168 (1925) (Holmes, J.) (quoted in Rosenberger, 115 S. Ct. 2526 (O'Connor, J., concurring)).

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III. The Court and the Law

Preliminarily, two items warrant mention. First, "content-based distinction," "subject-matter distinction," and "viewpoint-based distinction," are terms often loosely or interchangeably used when they crop up in law review articles or court opinions; n151 unless otherwise indicated, this Note refers to the term content-based distinction to include distinctions based on both subject-matter and viewpoint. n152 The term "subject-matter distinction" is used to signal a regulation that excludes an entire category of positions on a given idea; and the term "viewpoint-based distinction" refers to a regulation that excludes only one position on a given idea. For instance, a subject-matter regulation precludes advocacy of ice cream (to take a noncontroversial example) as an after dinner dessert; a viewpoint-based regulation precludes only advocacy of pumpkin pie ice cream (to take a controversial example) as an after dinner dessert. n153

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n151. See, e.g., Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988).

n152. Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981), discusses definitions.

n153. This relatively simple example illustrates the pitfalls of distinguishing subject-matter distinctions from viewpoint-based distinctions:

perhaps the exclusion of ice cream is a viewpoint-based distinction, and the true subject-matter distinction is one that excludes all discussions of desserts. The difficulty is that what label a given regulation merits is wedded to context. If a mother of three allows one child to insist on vanilla ice cream as an after dinner treat, but, detecting the incipiency of rebellion in a demand for pumpkin pie ice cream, prohibits another child to put the suggestion to a vote, she has engaged in viewpoint-based discrimination. The mother also has discriminated on the basis of viewpoint if she tolerates implorations for cookies and candy to the exclusion of ice cream - a wet and messy venture. Only if ice cream is the singular attraction for her children, and the mother, slavishly bowing to the health trend of her age, squelches all the siblings' pleadings, does her proscription fall under subject-matter regulation. (But maybe the mother is never safe; if the debate circles around what to do after dinner - eat, play, or read - the ice cream exclusion is a viewpoint-based distinction.) The appropriate level of generality, of course, is the fighting issue. See infra Section III.C.

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[*1693]

Second, from the outset this Note concedes that alternative conclusions could be drawn from the Court's long line of First Amendment precedent relating to the permissibility of content-based distinctions. This Note pursues - of the Court's sundry leanings - the more practical, plausible directions from the Court to arrive at its determination. This Part maintains that even if "[a public university] may not be run by [government] authorities as if it were a private [university,] ... surely that element of it which is ["university'] ought to be accorded some constitutional recognition, along with that element of it which is ["public']." n154 More specifically, it is this Part's contention that although a public university cannot discriminate on the basis of viewpoint, it can allocate funds to student groups on the basis of subject-matter.

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n154. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 573-74 (1975) (Rehnquist, J., dissenting). Justice Rehnquist's dissent regards the authority of municipal theaters to decide which films will be shown; in the quoted portion of his dissent in place of "public" appears "municipal," and in place of "university" appears "theater."

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A. The Fog First

1. Climax (Rhetoric)

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.... The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " n155 "If the marketplace of ideas is to remain free

and open, governments must not be allowed to choose "which issues are worth discussing or debating ....' " n156 "The classroom is peculiarly the "marketplace of ideas.' " n157 "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritarian selection." n158 "Otherwise our civilization will stagnate and die." n159

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n155. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)); accord Carey v. Brown, 447 U.S. 455 (1980).

n156. Consolidated Edison, 447 U.S. at 537-38 (quoting Mosley, 408 U.S. at 96).

n157. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

n158. Keyishian, 385 U.S. at 603 (citations omitted).

n159. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

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[*1694]

2. Anticlimax (Anti-Rhetoric)

But "[a] school need not tolerate student speech that is inconsistent with its "basic educational mission,' ... even though the government could not censor similar speech outside the school." n160 "The question whether the First Amendment requires a school to tolerate particular student speech ... is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." n161 "We [do not] question the right of [a u]niversity to make academic judgments as to how best to allocate scarce resources ...." n162

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n160. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1987) (holding that a school may delete student articles in its newspaper when the articles are contrary to the school's educational purpose) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a school may discipline a student for speech if the speech's vulgarity is inconsistent with the school's educational purpose)).

n161. Hazelwood, 484 U.S. at 270-71.

n162. Widmar v. Vincent, 454 U.S. 263, 276 (1981).

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B. Beyond the Rhetoric: Content-Based Distinctions in Education

Various scholars have made a convincing case that the First Amendment does not censure all content-based distinctions, or that "the anticlimax" speaks louder than "the climax." n163 This view parallels Justice Stevens' comprehensive description of First Amendment law that rhetorical fog often obscures. n164 Full recapitulation of the long and winding history of First Amendment law that supports (or ostensibly undermines) this view is unnecessary for the purposes of this Note. Because every potential First Amendment problem must be evaluated against the backdrop of the circumstances from which it springs, n165 this Note focuses mainly on the cases indispensable to a complete resolution of the issues in Rosenberger. This Part introduces the case law culled from the academic [*1695] context that the Rosenberger majority largely ignored or misapplied to reach a result in tension with the Court's prior teachings.

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n163. For an excellent analysis of the Court's treatment of content-based distinctions, see Paul B. Stephan III, The First Amendment and Content Discrimination, 68 Va. L. Rev. 203 (1982). Another helpful commentary appears in Daniel A. Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L. J. 727 (1980).

n164. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2561-71 (1992) (Stevens, J., concurring in judgment) (providing an eclectic review of contexts where content-based regulations of speech are essential, such as zoning, advertising, and employment relations).

n165. See, e.g., Healy v. James, 408 U.S. 169, 201-02 (1972) (Rehnquist, J. concurring in judgment) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969); United States v. Kokinda, 497 U.S. 720, 725-27 (1990) (plurality opinion) (adumbrating several factors that influence the analysis: whether the government is a regulator or manager; whether the forum is a traditional, limited, or nonpublic forum; whether the regulation in question is a time, place, or manner restriction)); id. at 738 (Kennedy, J., concurring in judgment).

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Before Rosenberger, the Court had never addressed the question whether a public university can discriminate on the basis of content in administering a student activities funding program. Moreover, no Supreme Court precedent dealing with First Amendment issues in public high schools and universities falls in line with the Rosenberger problem. Nonetheless, some important lessons emerge from the Court's academic cases. First, the Court has erected a virtually impregnable barrier to viewpoint-based discrimination in the public education system, similar to that existing in other areas of First Amendment law. n166 Second, the Court has acquiesced in content-based discrimination through its reluctance to displace the judgment of teachers, administrators, and others charged with formulating an academic curriculum and creating an academically fruitful environment.

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n166. Under a broader definition than that used in this Note, even viewpoint-based discrimination is permissible. See Post, supra note 30, at 1824-32.

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The most strident exclamations n167 about the importance of the free marketplace of ideas and the unfettered exchange of views appear in Court cases responding to naked attempts to suppress unappealing views n168 or to impose restraints upon speech of school faculty. n169 Before their adamant defenses of free speech values in universities can be understood, two repeatedly cited cases must be restored to their proper place. In Sweezy v. New Hampshire, n170 a state attorney general, combing his state for "subversive persons," posed to a Marxist professor of economics various questions including ones about a lecture the professor had delivered at a university; the professor's refusal to answer resulted in a conviction. In Keyishian v. Board of Regents, n171 a state law concerned with the spread of Communism required teachers at a university to sign an oath of loyalty or lose their jobs. Neither case involved a university, guided by academic concerns, making normal policy decisions; the state, not the university, was the enforcing agent in both cases. n172 Assaults by the state against the university incited the Court's indignation. n173 Hence, reciting [*1696] the Court's heated outbursts without regard to context misleads: predictions of stagnation and death n174 seem a bit extreme when the government is not persecuting faculty members because of their political beliefs but rather attempting to gauge an activity's educational value. For this reason, Rosenberger's reliance on these cases is misplaced, n175 and its all-encompassing definition of viewpoint (infirm on its own terms), n176 shares no semblance with the narrow viewpoint discrimination to which Keyishian and Sweezy spoke.

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n167. See supra text accompanying note 159.

n168. For a discussion of religion as a viewpoint, see infra Part III.C.

n169. For a discussion of nonsubsidy as restraint, see infra Part III.F.

n170. 354 U.S. 234 (1957).

n171. 385 U.S. 589 (1967).

n172. This is not to imply that a university would have been empowered to extract loyalty oaths and to conduct any chosen inquiry. Such action would probably be tantamount to viewpoint-based speech abridgment.

n173. For an incisive analysis of Sweezy and Keyishian, see Byrne, supra note 126, at 289-98, 312-14. Two other examples of invalid state impositions on public school curricula include Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law that prohibited teaching of foreign languages) and Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a law that prohibited teaching of Darwin's evolution theory).

n174. See supra text accompanying note 159.

n175. See Rosenberger, 115 S. Ct. at 2520 (citing Keyishian and Sweezy).

n176. See infra Section III.C.

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Equally contrary to pertinent precedent, the Court in Rosenberger effectively vests in individual students, as opposed to institutional officials, the power to define education. Generally, where administrators' judgments about academic merits and those of academy members conflict, it is the institution, not the individual, that prevails. A detailed study leads Professor J. Peter Byrne to conclude that "as far as courts are concerned, administrators may exercise extensive control over curricular judgments so long as they do not penalize ... solely for ... political viewpoint." n177 In cases where the Court has invalidated administrative judgments, it has painstakingly stressed the continuing vitality of the institution's discretion to make content-based policy decisions. For example, in Board of Education v. Pico, n178 upon finding that a school board could not remove books in a "narrowly partisan or political manner," n179 the Court plurality reiterated that the school board could doubtlessly remove books for "pervasive[] vulgarity" n180 or lack of "educational suitability." n181 Unthreatened was the school's right - obligation, in fact - to map [*1697] the course of discussion. In another instance, the Court in Regents of the University of California v. Bakke n182 concluded that a medical university admission program unconstitutionally took account of race. Evidently beside himself to allow the university the greatest possible leeway, Justice Lewis F. Powell n183 went so far as to provide the university with a way to circumvent the Court's judgment in an appendix, n184 agreeing that "universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas.' " n185 Openly Justice Powell here acknowledged that a university, as a threshold matter, should decide what type of dialogue will best add to the marketplace of ideas.

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n177. Byrne, supra note 126, at 301-02 (citing lower court decisions and academic articles) (arguing that university autonomy, as opposed to professorial autonomy, warrants judicial protection). Id. at 312. See also Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the ... professional judgment."); cf. Healy v. James, 408 U.S. 170, 202 (1972) ("The government in its capacity as employer ... differs constitutionally from the government in its capacity as the sovereign....") (Rehnquist, J., concurring in judgment).

n178. 457 U.S. 853 (1981) (plurality opinion).

n179. Id. at 870.

n180. Id. at 871.

n181. Id. Professor Byrne includes neither elementary nor secondary schools in his discussion regarding academic freedom. Byrne, supra note 126, at 288 n.137. His main reasons for so doing - the general lack of research below the

university level and the recognition that lower schools, but not universities, must inculcate values - although not irrelevant, are not as significant for purposes of this Note's analysis. Justice Stevens' citation in Fraser - a lower school case in which Justice Stevens admonishes the Court to resist interfering in routine academic affairs - to his concurrence in Widmar - a university case in which Justice Stevens argues similarly - affirms this point. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 691 n.1 (1986) (Stevens, J., dissenting).

n182. 438 U.S. 265 (1978).

n183. Although Justice Powell's opinion concurring in the judgment was not joined by any other justice, it is widely accepted as the statement of the Court's holding in Bakke.

n184. Bakke, 438 U.S. at 321 (Appendix to opinion of Powell, J.). I am indebted to Professor Klarman for this description of Justice Powell's Appendix.

n185. Id. at 313 (Powell, J., announcing judgment of the Court).

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The principles above articulated apply equally where educators' policy choices bring students displeasure: "A school cannot ban the Students for a Democratic Society from campus because it disagrees with or fears its social goals, but it can ban fraternities if it views them as trivial and anti-intellectual." n186 So, absent a showing of likely disruption or interference, the Court refused to permit nonrecognition of a student group adhering to unpopular philosophies in Healy v. James n187 and a regulation that prohibited students from wearing armbands to protest the Vietnam War in Tinker v. Des Moines School District. n188 The speech restrictions in Healy and Tinker fall into the category of proscriptions most abhorrent to First [*1698] Amendment free speech values; in both cases the schools unabashedly discriminated against speech based on the speakers' viewpoints. n189 The Rosenberger majority's reference to Healy n190 highlights the difference between that case and Rosenberger all the more: the contrast lies between exclusion of a select political ideology - not politics - and exclusion of religion - not a particular religion. The contrasting example Professor Byrne offers - removing fraternal groups from the round table of campus discourse - segues to the argument that blanket exclusions of fraternities, political organizations and religious groups should be classified as subject-matter distinctions rather than viewpoint-based distinctions, and hence should be (as previously argued) permissible, n191 rather than impermissible, as decided in Rosenberger. n192 In other words, a return to Dionysus is in order. n193

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n186. Byrne, supra note 126, at 316-17 (citing Healy v. James, 408 U.S. 169 (1972) and Waugh v. Board of Trustees, 237 U.S. 589 (1914)). Professor Byrne specifically confines his article's argument regarding academic freedom to academic speech, which he defines to include only scholarship and teaching; according to Professor Byrne, questions regarding student speech belong to civil rights jurisprudence. Id. at 258-67. Clearly, however, Professor Byrne sees a university's exclusion of a "dangerous" political organization and a university's elimination of a "frivolous" social group to be no different than a university's general decisions regarding educationally meritorious and

nonmeritorious speech. To oversimplify drastically, Professor Byrne's position is found in an elaboration of Justice Stevens' Widmar concurrence and Fraser dissent, both of which addressed institutional rights against students. See supra notes 120 and 181 and accompanying text.

n187. 408 U.S. 169, 186-94 (1972).

n188. 393 U.S. 503, 508-14 (1969).

n189. See, e.g., Tribe, supra note 5, 12-3, at 800 ("Viewpoint discrimination "is censorship in its purest form' and has been traditionally subjected to the highest level of scrutiny.") (quoting Perry Educ.'Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 63 (1983) (Brennan, J., dissenting)) (citations omitted).

n190. Rosenberger, 115 S. Ct. 2520.

n191. See, e.g., Farber, supra note 163, at 727-28 ("In recent years, the Supreme Court has upheld laws regulating misleading advertising, "indecent' language in radio broadcasts, political posters on buses, and the location of adult movie theatres.") (citations omitted).

n192. As earlier mentioned, supra note 134, this Note's interest lies in determining whether distinctions based on religion constitute viewpoint-based discrimination, not in a metaphysical sense, but on the terms the Court has articulated. Metaphysical questions, however, will not be wholly overlooked.

n193. See supra text accompanying note 149.

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C. Religion=PoliticsViewpoint

1. The First Amendment's Progeny: Politics=Religion

Arguably the analogy between fraternities and religious organizations is less than perfect. A more useful guide in determining whether a religious distinction is viewpoint-based or based on subject matter lies in the Court's treatment of politics. n194 Aside from the confusion surrounding much of the jurisprudence relating to religion, n195 turning first to politics seems promising because protecting political speech lies at the heart of the First Amendment. n196 If the Court regards distinctions based on the highest value First Amendment speech as permissibly based on content rather than viewpoint, with the consequence that political speech is left [*1699] with less First Amendment protection, then this buttresses the argument that religion too is a subject category rather than a viewpoint category. n197 Furthermore, religion and politics share many salient characteristics: both contain members with diametrically opposed views; both inspire fervid worship; both foment intense controversy and animosity; and both lay claim to a special constitutional status. n198

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n194. For an analysis of the Court's treatment of religion, see infra Subsection III.C.4 and Section III.D.

n195. See supra note 52.

n196. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2564 (1992) (Stevens, J., concurring in judgment).

n197. Cf. Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (per curiam) (denying that government was bound by Establishment Clause strictures in the context of government spending in the political realm); Robert D. Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 Cal. L. Rev. 1104 (1979) (drawing an analogy between the way government treats religion and the way government ought to treat politics).

n198. See U.S. Const. amend. I.

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2. Greer and Lehman: PoliticsViewpoint

Among the First Amendment cases implicating political speech, most pertinent to this analysis are Greer v. Spock n199 and Lehman v. City of Shaker Heights. n200 In Lehman, a municipality prohibited the city transit system from accepting political advertisements on its car cards, but allowed the transit system to sell advertising space to an array of other speakers, including "cigarette companies, banks, savings and loan associations, liquor companies, retail service establishments, churches, and civic and public-service oriented groups." n201 A Court plurality rejected a suit by a political candidate, whose attempt to secure ad space on the city's car card was rebuffed. The plurality declined to "dignify" the claim as a First Amendment violation, reasoning that the city, acting as proprietor, had merely made a managerial decision that its goals - raising revenue without getting embroiled in administrative difficulties, avoiding the appearance of political favoritism, and enhancing passenger tranquillity n202 - would best be effectuated by excluding political speakers. n203 That is, the plurality found that the city transit system had created a nonpublic forum in which content-based, but not viewpoint-based discrimination, could be reasonably employed. Hence, the plurality classified politics as a subject rather than a viewpoint. n204 Subsequently, the Court [*1700] reaffirmed this classification of politics in Greer. That case involved a federal military reservation which permitted civilians freely to visit unrestricted portions of the reservation and invited clergymen and artistic performers to the base, as well as a number of civilian speakers who discussed topics such as business management and drug abuse. The reservation, however, refused entry to partisan speakers. Finding no discrimination "based upon ... political views," n205 the Court disputed the idea that the First Amendment obliged the reservation to entertain political speech: the reservation - a nonpublic forum - had regulated speech reasonably on the basis of its political content, not illegally on the basis of its political viewpoint. n206

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n199. 424 U.S. 828 (1976).

n200. 418 U.S. 298 (1974) (plurality opinion). See also Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (rejecting a challenge to government exclusion of political speech from a charity drive in the federal workplace).

n201. Lehman, 418 U.S. at 300 (plurality opinion).

n202. Justice William O. Douglas' concurrence rested on this factor alone. Id. at 305-08 (enunciating a "captive audience" argument).

n203. Id. at 304 (plurality opinion).

n204. For a response to Justice William J. Brennan's contrary argument, see infra text accompanying notes 209-214.

n205. Greer, 424 U.S. at 838-39 (emphasis added).

n206. The historic importance of political neutrality in the military of course played a significant role in the Court's decision, id. at 839, but this does not detract from its recognition of politics as a subject rather than a viewpoint.

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Justice William J. Brennan, in his respective dissents, contended that the military in Greer and the municipality in Lehman both had enforced regulations that restricted speech based not on subject-matter but on viewpoint. In Greer, Justice Brennan compared the exclusion of politics to the exclusion of Roman Catholics, n207 though tellingly - likely not by accident - not to the exclusion of religion. Lehman's dissent presented more of a challenge: commercial advertisements could promote subject X (guns) as a public good (they kill good ducks), but political advertisements could not discourage subject X (guns) as public bads (they kill good ducks). "Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate ... would be barred from informing the public about his candidacy." n208 The point is a strong one: the public is exposed to "commercial viewpoints" and "public-oriented viewpoints," but not "political viewpoints," on a given subject.

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n207. Id. at 863 (Brennan, J., dissenting).

n208. Lehman, 418 U.S. at 317 (Brennan, J., dissenting); see supra note 22.

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Some commentators have sought to counter the force of Brennan's Lehman dissent with suggestions that the Lehman forum's "relative unimportance," n209 or the breadth of views included in the exclusion, n210 relieved worries of invidious viewpoint-based discrimination in Lehman. But such replies are inadequate: to the political candidate who instituted the action in Lehman,

the forum presumably was important. In turn, [*1701] absence of invidious intent need not be dispositive. n211 In any event, such responses offer no resistance to the viability of Justice Brennan's characterization of viewpoint-based discrimination. But accepting the logical validity of Brennan's argument need not translate into an admission of its legal or practical vitality. Like so many metaphysical efforts to whittle away distinctions, n212 Justice Brennan's definitional flourishes crumble fragile sand castles leaving nothing but ruins. If politics fits into a viewpoint-based category, then consistency places commercial speech in a viewpoint-based category too. After all, if the reverse scenario constitutes viewpoint-based discrimination, why is it not viewpoint-based discrimination to allow Democrats to rail against smoking on health grounds, but preclude sellers of cigarettes from reminding people that a shorter, sweeter life may be better than a long life of denial? n213 Hence, under Justice Brennan's logic, given that viewpoint-based discrimination is almost always illegitimate, n214 the Court's elevation of political speech above commercial speech is itself illicit viewpoint-based discrimination. n215 Unless the Court is willing to overrule long held precepts of First Amendment law, and bestow upon commercial speech the same special status to which political speech is generally privileged, Justice Brennan's viewpoint view is legally untenable.

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n209. Farber, supra note 163, at 762.

n210. Stone, supra note 134, at 112-14.

n211. See Arkansas Writers' Project v. Ragland, 481 U.S. 221, 228 (1987).

n212. See, e.g., Anthony T. Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 471 (1980) (chipping away at the distinction between liberalism and libertarianism).

n213. That Republicans can speak for the smokers is of little essence, as "it hardly answers one person's objection to a restriction on his speech that another person outside his control may speak for him." Regan v. Taxation With Representation, 461 U.S. 540, 553 (1983) (Blackman, J., concurring).

n214. See supra note 189.

n215. See Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (holding that pursuant to the First Amendment's hierarchy a city may ban commercial speech but not noncommercial speech on certain outdoor billboards).

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3. R.A.V.'s Multifaceted Dialogue

That the logical extension of Justice Brennan's definition of viewpoint ultimately must falter legally has not entirely halted its spread in cases where its full implications seem less obvious. Recently, in R.A.V. v. City of St. Paul, n216 Justice Scalia embraced Justice Brennan's broad vision of viewpoint: like Justice Brennan, Justice Scalia accepted the proposition that the state has unconstitutionally discriminated against a viewpoint when it does not allow commentary from all quarters on a subject that is generally open to

discussion. n217 In striking down an ordinance that pro- [*1702] scribed fighting words based on "race, color, creed, religion or gender," n218 Justice Scalia detected a viewpoint-based bias lurking beneath the apparent subject-matter distinction of the ordinance: true, the law coerced all racists, white and black; but whereas the law burdened racists by denying them access to certain terminology, it left "tolerant" speakers the option of utmost vulgarity. n219 Following the Lehman dissent, the R.A.V. majority imagines a dialogue between racists and nonracists. But common sense, hand in hand with reality, defies such a picture. The facts of R.A.V. demonstrate the point. To adopt the Court's euphemistic tenor, the racist wants most to "dialogue" with her group's target - be he white, black, or some other race - not the tolerant. Surely the situation in R.A.V. - a black family, the victim of "dialogue initiators" - illustrates the general rule, not its exception: black families, not nonblack tolerant families, are most likely to be recipients of burning crosses. The glib ease with which an alternative hypothetical suggests itself - a roundtable discussion of citizens debating the merits of a society arranged according to race - only emphasizes the difficulty of defining the confines of debate for First Amendment purposes. Always the element of arbitrariness surfaces: why a debate between racist blacks and racist whites, and not between, on the one hand, black and white racists, and, on the other hand, all nonracists? The Fish-Bork thought union provides one answer: the line may be arbitrary, but it is the chosen line. n220

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n216. 112 S. Ct. 2538 (1992).

n217. See Kagan, supra note 117, at 68-76; Wiggin, supra note 31, at 2032-37.

n218. St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minneapolis Legis. Code 292.02 (1990).

n219. 112 S. Ct. at 2548. In his concurrence, Justice Stevens responded with a rigorous analysis of First Amendment law that suggested a very different definition of viewpoint. Id. at 2561-71.

n220. See supra Section II.B.

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For instance, the Fair Housing Act n221 - and other statutes - forces people to deal with minorities but allows discrimination against racists. Even if there is no First Amendment expressive component in a landlord/tenant contract (to simplify the matter greatly), n222 the point remains. Legislation is evidence of society's view of the dialogue. Of course, just as a debate between Democrats and cigarette companies is not implausible, n223 so debate between tolerant people and racist people may take place. But such a concession in no way disposes of the issue for purposes of First Amendment analysis. That in an ensuing debate, tolerant people, but not racist people, could resort to intolerant words should matter only if the "racist [*1703] viewpoint" deserves more protection from the "nonracist viewpoint" than the "political viewpoint" deserves from the "commercial viewpoint." n224

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n221. 42 U.S.C. 3601-31 (1988 & Supp. V 1993).

n222. Cf. infra note 340 (quoting the Rosenberger dissent) ("There is a communicative element inherent in the very act of funding itself, cf. Buckley v. Valeo, 424 U.S. 1, 15-19 (1976) (per curiam)).

n223. See supra note 213.

n224. R.A.V., 112 S. Ct. at 2563-65 (Stevens', J., concurring in judgment) (citing, inter alia, Lehman (plurality opinion)).

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Aside from the absurdity that regulation of the "racist viewpoint" offends the First Amendment more than regulation of the "political viewpoint," n225 to accept the Brennan/Scalia viewpoint definition is to swallow a generalization of monstrous proportion. n226 As under Justice Brennan's theory politically inclined lesbians, environmentalists, antiabortionists, evangelists, thieves, and the middle-class, middle-aged, middle-American man all share a viewpoint, n227 so under Justice Scalia's theory the racist thread ties together white supremacists, black supremacists, and other racists. To avoid the legal absurdity and the monstrous swallow - not to mention the effective conflation of content-based discrimination and viewpoint-based discrimination - R.A.V. is best confined to its facts; Justice Scalia's reminder in R.A.V. that certain of the Court's "statements must be taken in context, ... [for they] are no[t always] literally true," n228 would be well applied to Justice Scalia's assertion in R.A.V. that an ordinance discriminates based on viewpoint by permitting "a sign saying . . . that all "anti-Catholic bigots' are misbegotten[,] but not all "papists' are." n229 (These, fighting words?) n230

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n225. R.A.V., 112 S. Ct. at 2565 (Stevens, J., concurring in judgment) (bringing to the Court's attention that its opinion grants more protection to fighting words than it has been willing to give to either political or commercial speech).

n226. And some have so swallowed. See supra note 217.

n227. Cf. Arkansas Writers' Project v. Ragland, 481 U.S. 221, 237 (1986) (Scalia, J., dissenting) (lending support to the proposition that there is no political viewpoint, but rather many political viewpoints).

n228. R.A.V., 112 S. Ct. at 2543.

n229. Id. at 2548.

n230. See id. at 2571 (Stevens, J., concurring in judgment).

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4. ReligionViewpoint and the Lamb's Chapel Problem

Like Justice Brennan before him, n231 Justice Scalia invoked Catholicism - not religion - in his effort to capture what is viewpoint. n232 But casually pronounced intuition is dictum, and Lamb's Chapel n233 is law. Its holding suggests that counterintuition is the law. In that case, a school district opened its facilities after hours to "social, civic, or recreational [*1704] uses ... and use by political organizations," n234 but forbade use of school premises for religious activities. n235 An evangelical church denied use of a school room to show a film series on child rearing filed a suit against the school district, alleging, inter alia, an infringement of its First Amendment right to free speech. In holding for the church, the Court found that the school district's exclusion of religion constituted viewpoint-based discrimination because included were "all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." n236 Oddly, for its definition of viewpoint the Court cited Cornelius, n237 a case in which the Court sanctioned the exclusion of political advocacy groups from a charity drive that conducted its fund raising activities in the federal workplace. That health and welfare agencies could speak on the topic of how to best help the needy, but political groups could not participate in the topic's discussion, did not trouble the Court. To the Court the exclusion was a content-based distinction, reasonable because the government had "concluded that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." n238 Because the motivating force in excluding political groups was not "solely to suppress the point of view [they] espouse[] on an otherwise includible subject," n239 the exclusion was constitutional, i.e., not viewpoint-based. Taken at face value, the reference in Lamb's Chapel to this very passage from Cornelius misconstrues badly the Cornelius definition of viewpoint.

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n231. See supra text accompanying note 207.

n232. See supra text accompanying note 229.

n233. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

n234. Id. at 2144.

n235. Id.

n236. Id. at 2147.

n237. 473 U.S. 788 (1985).

n238. Id. at 809.

n239. Lamb's Chapel, 113 S. Ct. at 2147 (citing Cornelius, 473 U.S. at 806) (emphasis added).

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5. Rosenberger and the Problem with the Multifaceted Dialogue

If Lamb's Chapel misconstrued Cornelius, the Rosenberger opinion proceeds with the misapplication. Providing little independent analysis, relying almost exclusively on the analysis in Lamb's Chapel, and occasionally on R.A.V.'s reasoning, the Court ignored less obviously pertinent precedent (although the dissent briefly mentions Greer and Lehman). n240 Dazzled by the topical and spatial proximity of Lamb's Chapel, the Court cited it for the proposition that "it discriminates on the basis of view [*1705] point to permit all views about ... [a subject matter] except those dealing with the subject matter from a religious standpoint." n241 Yet the Court could barely bring itself, without the Lamb's Chapel crutch, to declare that religion is a viewpoint. Struggling, Justice Kennedy admitted the difficulty: "It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophical inquiry throughout human history." n242 Just as in the political context, the impudence of urging that the bond between different religions - Jews for Jesus and Chassidic Jews - constitutes a viewpoint inspires incoherence in those that make the effort.

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n240. Rosenberger, 115 S. Ct. at 2548, 2551; for the dissent's distinction of Lamb's Chapel and Rosenberger, see id. at 2550-51.

n241. Id. at 2517.

n242. Id. (emphasis added).

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The confusion, far from being subsequently resolved, continues, as the Court blurred any meaningful distinction that had remained between subject and viewpoint.

The University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make ... payments, for the subjects discussed were otherwise within the approved category of publications. n243

Unable to deny that religion is a subject matter, but apparently unwilling to agree that this "vast area of inquiry" cannot be a viewpoint, the Court played the R.A.V. word game. The analysis purports to rise to a higher level of sophistication, by refusing to envision a "bipolar" debate. n244 In R.A.V. this vision of three dimensional discourse precluded the government from prohibiting racial fighting words, because other (tolerant?) fighting words are not similarly eliminated. This same vision prevents the University in Rosenberger from "discriminating against an entire class of [religious] viewpoints," n245 on a given topic (the Court's example is racism, perhaps a hooded reference to R.A.V.). But the class of viewpoints on religion comprises the subject of religion, just as the class of viewpoints on politics comprises the subject of

politics. Nor can the class [*1706] of viewpoints on charity (money to AIDS (a gay issue) or money to breast cancer (a gender issue) or money to sickle cell anemia (a racial issue) be reduced to a single viewpoint. But the Court's holding in Rosenberger forces just such a reductionist approach. Not only is such an approach counterintuitive, but, as earlier discussed, it is contrary to a long line of Supreme Court precedent (for instance Lehman, Greer, and Cornelius).

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n243. Id at 2517-18.

n244. Id. at 2518.

n245. Id.

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Furthermore, the notion that religion is a viewpoint is hard to reconcile with the Constitution and the Court's interpretation of it. As Justice Scalia pointed out in his Lamb's Chapel concurrence, the Constitution's Free Exercise Clause "gives ... preferential treatment" to religion. n246 As he neglected to mention, however, the Establishment Clause concomitantly burdens religion. One example will suffice: where the government "may not aid one religion [or] even aid all religions," government may "use public money to facilitate and enlarge public discussion [of political issues]." n247 Under this view, the government may freely promote the "political viewpoint," but must discriminate against the "religious viewpoint." The "strangeness" n248 of a Constitution that simultaneously benefits and burdens is not so peculiar; at least the contradiction is not peculiar to religion. For instance, as the Court has interpreted it, the First Amendment recognizes the practical reality that politics is a subject, but at the price of a quasi-paradox: government, in its capacity as military commander, proprietor, or employer, may shun the First Amendment's most precious even as government welcomes its inferiors. n249 In light of all this, the best that could have been done with Lamb's Chapel to bring it into line with Court precedent would have been to recast the Court's holding: the school district had created a limited public forum and had engaged in content-based regulation of speech without advancing a sufficiently compelling state interest. The Court's decision in Rosenberger, however, precludes a healthy narrowing of Lamb's Chapel in the shape of a Widmar v. Vincent. n250

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n246. Lamb's Chapel, 113 S. Ct. at 2151 (Scalia, J., concurring in judgment).

n247. Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (per curiam) (citing Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)); see also Rosenberger, 115 S. Ct. at 2544 n.9 (citing numerous different federal statutes that condition fund grants on the exclusion of religious activity).

n248. Lamb's Chapel, 113 S. Ct. at 2151 (Scalia, J., concurring in judgment).

n249. See R.A.V., 112 S. Ct. 2538, 2561-71 (Stevens, J., concurring in judgment).

n250. 454 U.S. 263 (1981).

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D. The (Ir)Relevance of Widmar n251

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n251. For a discussion similar to the one that appears in Part III.D, see University S. Ct. Brief, supra note 89, at 12-18.

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In Widmar, the Court entertained a claim that a university had violated the Free Speech Clause by refusing a religious student group meeting space that it granted to all other student groups. The university defended its policy by reference to the Establishment Clause. Because the Court found that through its open access policy the university had created a limited public forum, the Court required the university to demonstrate that its regulation was narrowly drawn to effectuate a compelling state interest, "the standard of review appropriate to content-based exclusions." n252 Conceding that complying with the Establishment Clause would meet the appropriate standard of review, the Court rejected the idea that a policy of equal access would interfere with the Establishment Clause. Consequently, the Court agreed with the religious group that the university had violated its First Amendment right of free speech.

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n252. Widmar, 454 U.S. at 270 (emphasis added).

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Three observations are particularly relevant. First, the university's "stated policy [was] ... to encourage the activities of student organizations" n253 and its "avowed purpose ... to provide a forum in which students can exchange ideas." n254 Thus, by its own admission, the university believed that the formation of student groups, and their subsequent discourse, was in and of itself a good for the university; the university attached no qualification to its stated policy, such as a condition that the groups be educationally oriented. Second, in sharp contrast to Lamb's Chapel, the Court in Widmar consistently referred to the university's classification as a content-based distinction, not a viewpoint-based distinction. Third, the Court specifically forswore "undermining the academic freedom of public universities" n255 through "use of ... terms [like] "compelling state interest' and "public forum' "; n256 similarly, the Court pointedly distinguished the case in Widmar from a case where a university must "make academic judgments as to how best to allocate scarce resources." n257 In other words, in the Court's eyes, the Pico and Bakke concerns were of no instance in Widmar. n258

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n253. Id. at 265.

n254. Id. at 271 n.10.

n255. Id. at 276 n.20 (quoting Widmar, 454 U.S. at 271-87 (Stevens, J., concurring)).

n256. Id.

n257. Id. at 276.

n258. See supra Parts III.A and III.B.

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The distinction between the university in Widmar and a university making a policy decision regarding how best to educate its students is [*1708] unfortunately prosaic: cost accounts for the difference. Theoretically, of course, access to university facilities, not infinitely available, constitutes a subsidy, different from a cash grant only in form: rental space in lieu of rent money; electricity but no companion utility bill; and depreciation without assessment. n259 In practice, however, university expenditures resulting from an open access policy are virtually zero. n260 The university incurs mainly fixed, not marginal, costs from operating its facilities. n261 Nor is meeting space at universities generally scarce. n262 Thus, whereas a university that wishes to give monetary aid to student organizations must distribute limited funds to a number of interested organizations based on academic concerns, a university that desires to support student groups by inviting them to meet on university premises may do so without favoring any one group over another. The constraint on the one hand forces a policy choice which, for a university, is an academic judgment. The contrast between Widmar and Rosenberger, then, is the distinction between access to space and access to money: the theoretical difference in degree is a practical difference in kind. Admittedly, the proposition survives only in the bounds of a reasonable range; but then, that is the only place it need live.

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n259. University S. Ct. Brief, supra note 89, at 13-16.

n260. The Court suggests that as an empirical matter money may not be scarce, and space may not be cheaply available "in any given case." Rosenberger, 115 S. Ct. at 2519-20. True, but in the case of a university money is relatively scarce and space is relatively cheap.

n261. Id.

n262. But if space were scarce, surely "if two groups of 25 students requested the use of a room at a particular time - one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet - the First Amendment would not require that the room be reserved for the group that submitted its application first.... [A] university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom." Widmar, 454 U.S. 263, 278 (Stevens, J., concurring in

judgment). Here Justice Stevens seems to express the view that Mickey Mouse should prevail over Hamlet. Good that he is willing to leave such judgments to academics.

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Mocking the University's suggestion "that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not," n263 the Rosenberger majority shoots an easy target: we have never "indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." n264 Resort to sacred constitutional principles, a refusal to answer the University's more subtle argument, obscures the point of Widmar, before its revisionist expansion in Rosenberger. The contention is not that scarcity permits illegality, but that scarcity belies [*1709] the proposition that the University "expends funds [just] to encourage a diversity of views from private speakers." n265 Scarcity forces discrimination, not of viewpoints, but of goals: untrammeled diversity versus education: warnings of rides to Hell without air conditioning or toilets n266 versus "Plato, Spinoza, and Descartes." n267

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n263. Rosenberger, 115 S. Ct. at 2519.

n264. Id. at 2519-20.

n265. Id. at 2519.

n266. See supra text accompanying note 1.

n267. Rosenberger, 115 S. Ct. at 2520.

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E. Public Forum Analysis: The Story of Money VersusSpace

For largely the same reasons that Widmar's holding is inapposite to Rosenberger, the public forum doctrine upon which the majority at least implicitly relied has a place in Rosenberger only insofar as it elucidates obscurities in First Amendment jurisprudence, removes confusion from an ambiguous First Amendment situation, or foreshadows the direction First Amendment law is heading. In other words, its use lies in its value as an analogy. As a doctrinal hook for Rosenberger, however, public forum analysis is superfluous. Hence, the majority's assertion (as earlier mentioned), n268 that "the SAF is a forum," n269 even with the qualification that it is such "more in a metaphysical than in a spatial or geographic sense," n270 leads to the same wrongheaded result as the majority's interpretation of Widmar. As in Lamb's Chapel, the Court in Rosenberger did not squarely address the public forum issue because the majority rested its holding on the University's supposed viewpoint discrimination. The Court, however, implied the public forum doctrine's applicability where it has no place. Once again, the dispositive factor is unhappily unsubtle: the difference is between university money versus university space. The crucial contrast between space and money need not be a distinction

between cheap and expensive subsidies for purposes of explaining why public forum analysis may be appropriate when the request is for space and inappropriate when the demand is for cash grants. Indeed, were this the distinction, it would be utterly indefensible. Although for a university, permitting reasonable use of its facilities is relatively cheap, n271 certainly providing space is not always inexpensive for the government. n272 Exam- [*1710] ples of costly space abound. In Lehman the government's space generated revenue for the city; n273 in Greer unrestrained use of space threatened a "dilut[ion of] the quality of [military] training"; n274 and in Cornelius the cost of unconditionally free access was "jeopardization" of a charity drive and "disruption" in the workplace. n275

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n268. See supra note 78.

n269. Rosenberger, 115 S. Ct. at 2517.

n270. Id.

n271. See supra Section III.D. This analysis supposes that student groups seeking university facilities are willing to comply with reasonable university regulations. The problem of unruly organizations is not a problem for this Note. For a discussion of the university's necessary discretion to remove disruptive groups from their facilities, see Healy v. James, 408 U.S. 169 (1972).

n272. See supra note 260.

n273. Lehman, 418 U.S. at 299-300.

n274. Greer, 424 U.S. at 833 n.3.

n275. Cornelius, 473 U.S. at 810.

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A simplistic version of the public forum doctrine is a Court cost/benefit calculus: "The Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." n276 "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." n277 Because the character of space differs widely depending on special circumstances of each case, the Court's two-tier inquiry into the forum type and the nature of the speech restriction is not useless where the result is not preordained: a sidewalk may be a nonpublic forum, n278 and a municipal theater may be a limited public forum. n279

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n276. Cornelius, 473 U.S. at 800.

n277. Perry, 460 U.S. at 44; but cf. Post, supra note 30, at 1765-1783 (focusing on whether the government presides over its property in its capacity

as governor or manager).

n278. United States v. Kokinda, 497 U.S. 720 (1990) (plurality opinion).

n279. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

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Whereas case-by-case examination of factors such as government "policy[,] ... practice[,] ... the nature of the property[,] and its compatibility with expressive activity" is necessary when a claimant seeks access to space, n280 the balance need only be struck once when access to university money is sought. This is because the Court "will not find that a public forum has been created in the face of clear evidence of a contrary intent." n281 Virtually by definition, a university cannot intend to make equally accessible its monies to all student groups in the manner of the university in Widmar. With such an intent, the university would simply be redistributing wealth from students who do not participate in group activities to students who become involved in group activities; the university would be indifferent between sponsoring a fraternal group that paid homage to Dionysus through inebriation and a literary group that wrote poetry in his honor. n282 But an institution equally content to funnel money to either organization is no longer a university, but, in Stanley [*1711] Fish's words, a "soapbox." n283 Hence, unlike claims for access to space, all claims for monetary sustenance are fungible, n284 and a single analysis reveals that if university student activity funds must fit into a fora category, it must be the nonpublic forum category. There is no need to duplicate the analysis with each new case, forcing every new university defendant to repeat that its educational purpose conflicts with a mandate not to discriminate between drunks and poets. Nor is there a need even for mention of the public forum doctrine, which serves merely as a detour, wasting the time of the parties and the judiciary. Remove the intrusion, and a challenge to a university student activities funding scheme falls squarely into the Court's First Amendment subsidy/taxation cases. n285

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n280. Cornelius, 473 U.S. at 802, 800-06.

n281. Id. at 803.

n282. See supra note 149.

n283. Fish, supra note 139. This discussion assumes that money is a scarce resource. If a university collects fees from its students during a given year, and at the end of the year money is "left over," the university has a number of options. To name two, the university could offer the money to an educational group or reserve the funds for the following year. It need not waste the money on groups whose activities will not advance education.

n284. Whereas a meaningful legal distinction between money and space would occasion mischief in areas of jurisprudence such as tax law, for purposes of First Amendment analysis, drawing a clear line between space and money would not create similar distortive effects. Reductio ad absurdum, a university could convert its subsidies from space to cash if the university knew that the limited public forum doctrine will forbid it from discriminating on the basis of

content in granting facility space, whereas the nonpublic forum will only preclude it from discriminating on the basis of viewpoint in allocating funds. For instance, instead of opening its rooms to all groups, as it must under Widmar, a university could close its rooms to all students, and give rental money to the groups it favors. The feasibility of such strategic behavior is highly questionable; could it really be that a university could afford to let rooms sit unused only to pay money to rent more rooms, all so it can engage in content-based discrimination of student groups and activities in granting them access to space?

n285. No funding scheme has yet been subjected to scrutiny under the public forum doctrine, Rosenberger's undeveloped analysis aside. Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) was a possible candidate for public forum analysis, but the court in that case did not refer to the public forum doctrine even once. In Gohn the court found that the University of Arkansas unconstitutionally denied the Gay and Lesbian Students Association student activities funds on the basis of the organization's viewpoint. See also Tipton v. University of Haw., 15 F.3d 922 (9th Cir. 1994) (upholding a denial of university funding to religious activities (not organizations) without relying on public forum analysis).

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F. The Current Subsidy/Taxation Model in First AmendmentLaw n286

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n286. Law review articles puzzle over various hitherto intractable problems arising in the Court's First Amendment subsidy/taxation cases. See, e.g., Richard A. Epstein, The Supreme Court, 1987 Term - Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4 (1988); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984); McConnell, supra note 115; Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593 (1990). Such issues are well beyond the scope of this Note.

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1. Rust and Regan

The Court's selective funding cases n287 recognize that by extending monetary aid to a given activity, but not to its natural alternative, the government effectively raises the cost of the unfunded activity and lowers the cost of the subsidized counterpart, with the possible consequence that more people will choose the government favored activity. n288 The Court has refused, however, to declare unconstitutional this government attempt at "distortion." According to the Court, the government's policy choice is not a form of viewpoint-based discrimination but simply a value judgment. Nor does the government's denial of monies to the disfavored activity punish the activity

in the way of a prohibition for purposes of First Amendment jurisprudence. n289 The result is a pragmatic, if not altogether theoretically coherent, n290 refusal to tie the government's hands and thus disable it from governing. n291

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n287. Economically, taxes and subsidies differ primarily in form, not substance. See Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983). This Note will rely similarly on subsidy and taxation cases and will refer to them interchangeably as subsidy/taxation cases and selective funding cases.

n288. See, e.g., Rust v. Sullivan, 500 U.S. 173, 192-94 (1990).

n289. Some economists contend that the contrast between a prison term and a fine (or a nonsubsidy) is overstated, arguing that both are costs to a citizen. See Richard A. Posner, Economic Analysis of Law 227 (4th ed. 1992). Just as with access to university space and university funds, the difference is theoretically viable but practically nonsensical, because the cost disparity between a monetary penalty and a loss of freedom is so great. But see Owen M. Fiss, State Activism and State Censorship, 100 Yale L.J. 2087, 2097 (1991) (contending that the effect of a monetary fine may deter as much expression as a prison sentence).

n290. See supra note 286.

n291. See Yudof, supra note 136, at 897-906.

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That the putative activity is a constitutional right does not change the conclusion, as two recent cases implicating the Free Speech Clause reaffirm. In Regan v. Taxation With Representation n292 Taxation With Representation ("TWR"), a nonprofit lobbying organization, challenged [*1713] Internal Revenue Code provisions that allowed taxpayers to deduct charitable contributions only to organizations not primarily engaged in "carrying on propaganda" or "influencing the legislature," n293 and to veterans' groups, regardless whether their activities consisted substantially of lobbying. n294 TWR argued that the code sections unconstitutionally burdened its First Amendment free speech rights. The Court agreed with TWR that its lobbying activities were constitutionally protected under the First Amendment, but rejected TWR's claim that the regulations, because they "subsidized some speech, but not all speech," n295 were constitutionally suspect. Noting that the government had not distinguished between groups based on race or national origin, and finding no evidence that the government had "aim[ed to] suppress[] ... dangerous ideas," n296 the Court declined to apply strict scrutiny to the government's regulations. Hence, absent suspect classification (political speakers are not a suspect class) or viewpoint-based discrimination (once again, politics is a subject, not a viewpoint), under Regan content-based distinctions affecting First Amendment free speech rights are no different than distinctions by which benefits redound to optometrists but not to opticians. n297 In both scenarios an unequal, but not unconstitutional, distribution of resources is the product of assorted interested parties vying for limited resources.

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n292. 461 U.S. 540 (1983).

n293. I.R.C. 501(c)(3), 170(c)(2) (1988 & Supp. V 1993).

n294. Regan, 461 U.S. at 541-47. This Note addresses TWR's equal protection claim, based on this exemption for veterans' groups, only insofar as it affects TWR's free speech claim.

n295. Id. at 548.

n296. Id. (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958))).

n297. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

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The Rosenberger majority attempts to recast Regan, denying its applicability by explaining that it "relied on a distinction based on preferential treatment of certain speakers - veterans organizations - and not a distinction based on the content or messages of those groups' speech." n298 Such a redescription of Regan conveniently ignores that nonveteran charitable organizations also received preferential treatment, and the only charitable organizations that received "nonpreferential" treatment (i.e., discriminatory treatment) were those engaged in lobbying activities. The speech content of the lobbying groups in Regan was as irrelevant there as the content of the message conveyed by the religious groups in Rosenberger. In Regan the political speaker, in Rosenberger the religious speaker, is the target of the discrimination.

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n298. Rosenberger, 115 S. Ct. at 2519.

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Rust v. Sullivan n299 is a more difficult case, the result of a joyless [*1714] politicization of a medical procedure. n300 In Rust a battle for abortion rights was waged and lost. This aspect of Rust obfuscates the legal holding of the case. Operating on the assumption that beliefs about abortion are akin to (political) viewpoints leads to the conclusion that the Court in Rust acquiesced in government distribution of funds based on viewpoint. n301 Against a challenge on free speech grounds, Rust upheld a government funding scheme that conditioned an award of monies for family planning programs on the recipient medical staff's agreement to promote only the government's view on abortion. n302 First, the government's regulations prohibited counseling or referrals for abortion, but allowed counseling and referrals for ensuring the continued viability of the fetus. n303 Second, the government's regulations directed medical staff to respond to requests for abortion information by echoing the party line - abortions are inappropriate and the government disapproves of them - and then providing information on prenatal care and adoption services. n304

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n299. 500 U.S. 173 (1990).

n300. For critical commentary, see Cole, supra note 137; Kagan, supra note 117.

n301. See Cole, supra note 137, at 688 n.47.

n302. 42 U.S.C. 300 (1988 & Supp. V 1993).

n303. 42 C.F.R. 59.8(a)(1) (1994).

n304. Id. 59.8(a)(2), (b)(5); 53 Fed. Reg. 2943-44 (1988).

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To understand Rust, a fresh start is in order. Ignoring the Court's inapt reference to the government's ability to encourage democracy abroad to the detriment of communism and fascism, n305 and restating the Court's holding in less inflammatory terms, n306 show Rust to be but a replay of Regan. Properly cleansed, Rust stands for the proposition that the gov- [*1715] ernment neither infringes the First Amendment when it demands that monies reserved for a certain medical service be confined to that service nor when government singles out one, but not another, medical service for favorable treatment. An analogy to replace the democracy-communism-fascism model would thus be a government grant to doctors treating breast cancer but not to doctors treating lung cancer. The holding is that of Regan: "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," n307 even when an "analogous counterpart right[]" is subsidized. n308

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n305. Rust, 500 U.S. at 194 ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, ... it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."). The analogy has chilled commentators, who have rushed to narrow its seeming breadth. See Cole, supra note 137, at 678, 687. But a cursory glance reveals that the analogy does not even begin to constitutionalize viewpoint-based discrimination. Whereas public schools generally steer clear of manufacturing little Democrats, little democrats are daily made. Unless one believes that public schools are guilty of viewpoint-based discrimination by neglecting to foster appreciation for fascism and communism in school children, the Court's analogy need not frighten anyone. See, e.g., Serge F. Kovaleski, Robert and Christina Jeffrey Pack Their Belongings in Arlington, Wash. Post, Jan. 28 , 1995, at A6 (detailing Christina F. Jeffrey's financial troubles, resulting from her abrupt removal from the position of House Historian because of her statements criticizing a Holocaust curriculum at a public school for its failure to include the views of Nazis and the Ku Klux Klan). So the analogy is truly innocuous, like stating that public schools can promote abstinence, but need not promote promiscuity and prostitution. The analogy is inapt because it fails in its purpose: instead of reassuring, it instinctively alarms.

n306. But cf. Fish, supra note 139 (urging that politics neither can nor should be separated from principle).

n307. Rust, 500 U.S. at 193 (quoting Regan, 461 U.S. at 549).

n308. Id. at 194.

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2. The (Special) Meaning of Arkansas Writers' Project (After Leathers)

Where Rust's special circumstances help only to obscure, the factual context of Arkansas Writers' Project v. Ragland n309 goes far towards illuminating the Court's holding in that case. The Court in Arkansas Writers' Project v. Ragland struck down a statute that exempted from taxation newspapers and religious, professional, trade and sports journals, but taxed general interest magazines, notwithstanding an explicit concession that the government lacked an invidious discriminatory motive. n310 In place of a cogent justification for invalidating the statute, the Court resorted to the easy, if inaccurate, language of Police Department v. Mosley n311 and Carey v. Brown, n312 whose vehement denunciations of any offense to speech could be relied upon to undermine all content-based distinctions with ties to the First Amendment. n313 Prima facie, Arkansas Writers' Project appears in tension with Rust and Regan. Although decided after Regan, but before Rust, it seems neither to overrule nor be overruled. Albeit in a different posture, Justice Thurgood Marshall proffered a contextual reconciliation of the cases: "It is incorrect[to] conflate[] ... cases on selective taxation of the press and ... cases on the selective taxation (or subsidization) of speech generally." n314 According to Justice Marshall, the press enjoys a "preferred position over other speakers" n315 and evokes special solicitude from the Court, leaving less room for government policy decisions that interfere with the freedom of [*1716] the press. In a similar vein, Professor Elena Kagan has argued that extending Arkansas Writers' Project's mandate of unwavering content-neutrality in regulating the press to all government speech regulation would cripple most government funding programs. n316 Leathers v. Medlock, n317 which sustained a government taxation scheme that relieved print media, but not cable television services, from having to pay taxes, highlighted another important aspect of Arkansas Writers' Project: the Court in Leathers stressed that whereas in Arkansas Writers' Project only three magazines bore the tax burden, in Leathers the tax fell upon one hundred cable systems. n318 So the holding of Arkansas Writers' Project is incomplete without emphasis of two factors: content-based discrimination of press speech that singles out a small group of the press is presumptively unconstitutional.

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n309. 481 U.S. 221 (1987).

n310. Id. at 223, 228.

n311. 408 U.S. 92 (1972).

n312. 447 U.S. 455 (1980).

n313. See supra Part III.A.1.

n314. Leathers v. Medlock, 499 U.S. 439, 464 (1991) (Marshall, J., dissenting).

n315. Id.

n316. Kagan, supra note 117, at 59 n.74; see Arkansas Writers' Project, 481 U.S. 221, 235-38 (Scalia, J., dissenting).

n317. Leathers, 499 U.S. 439 (1991).

n318. Id. at 1444.

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3. The League of Women Voters Knocks Down Footnote 28's Paper Tiger

The principles articulated in Regan, Rust, Arkansas Writers' Project, and Leathers suggest that the Court should have guarded against attack the content-based distinctions in Rosenberger. In Rosenberger there is no suspect or special class n319 - neither a racial minority nor the press is targeted. There is no effort to suppress disfavored ideas - religion is not a dangerous viewpoint, but a subject similar to politics. n320 And there is no singling out of a small group - not only religious organizations, but also, inter alia, political, charitable, social, and fraternal organizations are excluded. n321 That Rosenberger's setting is a university cuts in favor of, not against, allowing content-based discrimination, consistent with the Court's education cases. n322 Rust's dictum to the effect that subsidies to universities accompanied with content-based conditions on speech may be illegitimate is inapposite to Rosenberger's facts. n323 The dictum speaks to a situation where university freedom is threatened, as its citation of [*1717] Keyishian signals. n324 Surely it would turn the dictum on its head to appropriate it for the purpose of restricting a university's freedom. Justice Scalia's forceful reminder, really a restatement of the Fish-Bork combination, n325 here applies: "There is no need, ... and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy that one might think appropriate for opposing shades of political expression." n326

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n319. See Tribe, supra note 5, 16-3 to 16-24, at 1465-1553 (outlining the various class-based distinctions that will give rise to strict scrutiny or intermediate scrutiny review).

n320. See supra Section III.C.

n321. See supra notes 12-14. As just one indicator of the large number of students affected by the exclusion, it is well to note that more than 30% of all undergraduate University students are members of either a fraternity or sorority. Telephone Interview with Erin L. Thomas, Inter-sorority Council President, University of Virginia (Mar. 6, 1995).

n322. See supra Part III.B.

n323. Rust, 500 U.S. 173, 200.

n324. See supra Part III.B.

n325. See supra Part II.B.

n326. Arkansas Writers' Project, 481 U.S. 221, 237 (Scalia, J., dissenting).

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Just as with the Establishment Clause, n327 the Court of Appeals in Rosenberger overlooked Justice Scalia's insightful admonition regarding the doctrine of unconstitutional conditions. Relegating to a footnote the argument from the Court's selective funding cases, the Court of Appeals purported to distinguish Rosenberger from those cases in a flurry of formalism. So certain that Rosenberger did not fit under the selective funding rubric, the Court of Appeals agreed to discuss, only for "thoroughness' sake," n328 one selective funding case, Rust. Explained the Court of Appeals in footnote 28: "The issue in Rust was not - as here - whether the recipients could obtain access to government benefits. It was, instead, whether the government could be allowed to dictate the use to which already allocated funds could be dedicated." n329 With this distinction as a rule, to conform its situation to that of Rust, the University need only give SAF funds to Wide Awake and subsequently forbid Wide Awake from using the monies for religious purposes. Just as Rust's medical staff could not speak of its desired topic, abortion, so Wide Awake would not be able to speak of its desired topic, religion. Both the Rust and Rosenberger recipients, however, could have money to speak on other subjects. The distinction between an award of funds to a group provided they say X, but not Y, and no grant of monies to a group if they say Y, but not X, is a paper tiger. And it is not a legally recognized distinction.

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n327. See supra Part I.C.

n328. Rosenberger, 18 F.3d 269, 281 n.28.

n329. Id.

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FCC v. League of Women Voters, n330 knocks down the paper tiger with a distinction that is legally recognized. Under League of Women Voters the government can disallow expenditure of government monies on speech outside the scope of the program to which it has allocated funds, but cannot condition government grants so as to disable individuals from expending private funds on speech beyond the bounds of the govern- [*1718] ment's program. Hence, in League of Women Voters the Court struck down a law that prevented noncommercial television and radio stations that received government funds from editorializing, because the law contained no provision that would allow the recipients to segregate government funds from private funds to finance editorial activity with their own money. n331 Missing from both Rust and Regan was the extraneous, coercive element that rendered infirm the government funding program in League of Women Voters. Crucial to the Court's holding in Rust was the ability of the medical staff freely to provide abortion counseling and referrals with nongovernmental funds. n332 Similarly in Regan, TWR could receive the tax benefits available to other charitable organizations for nonlobbying activities, so long as it kept reasonably separated its lobbying activities from its nonlobbying activities. n333 Nor can any punitive attempt be discerned in

Rosenberger. Should Wide Awake form a subsidiary nonreligious organization, that organization will be eligible for funding on the same grounds as all other University organizations that do not have religious parent organizations. The absence of a League of Women Voters speech penalty, not the manner by which the University does Rust, should be of consequence. By failing to recognize this, footnote 28, together with footnote 27, elevates form over substance, depriving the University of governing power to which it is entitled under Rust, Regan, and a string of related and unrelated Court precedent. n334

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n330. 468 U.S. 364 (1984).

n331. Id.

n332. Rust, 500 U.S. at 197.

n333. Regan, 461 U.S. at 545.

n334. See supra Part III.A-.F.

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4. Rust and the State's Message

Analogous to the Court of Appeals' effort to separate Rosenberger from Rust was the half-hearted attempt of Wide Awake to distinguish the cases n335 and the majority's acceptance of the distinction Wide Awake offers. Wide Awake's argument rests on the rather incredible proposition that the doctors in Rust are mere "conduits for government messages," n336 since the government is not "supporting a diversity of expression," n337 from which follows that the speech of the doctors is "fairly attributable to the State." n338 Declining to carry on with Wide Awake's specific terminology, the Court in Rosenberger carefully contrasted Rust in general [*1719] terms. "There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." n339 According to the Court, the situation in Rosenberger differs from that in Rust because the University disburses funds to facilitate a multitudinous exchange of views. First of all, in Rosenberger the University's aim is not to promote diverse views, but to support education, which in turn entails subsidizing educational groups. That many different groups receive monies does not transform the policy's consequences (various organizations receive funding) into the policy's goals (only educational groups should receive funding). n340 In any case, statistics here bend to the will of him who proffers them; the majority's description of the cases is superficially appealing, but misleading. Rust ostensibly presents a case where the government has simply chosen to fund a certain view on family planning, and Rosenberger ostensibly presents a case where the government has elected to subsidize a large variety of different views to the exclusion of a select few. But if account is taken of all the various medical services to which the government has allocated funds, Rust conforms to the majority's characterization of Rosenberger: it is a case in which one type of medical procedure - abortion - is denied access to funds, while hundreds of other medical procedures receive monies. Furthermore, on a practical level, a doctor's medical advice to a patient is not something commonly thought of as

state directive, as even the Court in Rust acknowledged by implication. n341 In fact, much of the criticism Rust has garnered stems from its apparent invasion of the doctor/patient dialogue; mainly, commentators trouble over the fact that patients would rely on a doctor's statements as her own rather than as vicarious state expression. n342 Hence, the problem in Rust was not with government expression of its own position on abortion per se, but rather with government use of reluctant conduits to express its position.

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n335. Wide Awake devotes a paragraph to its argument. Wide Awake S. Ct. Brief, supra note 16, at 28.

n336. Id.

n337. Id.

n338. Id.

n339. Rosenberger, 115 S. Ct. at 2519. The Court distinguishes Widmar and Regan on the same grounds. Id.

n340. The dissent noted: "There is a communicative element inherent in the very act of funding itself, cf. Buckley v. Valeo, 424 U.S. 1, 15-19 (1976) (per curiam), and although it is the student speakers who choose which particular messages to advance in the forum created by the University, the initial act of defining the boundaries of the forum is a decision attributable to the University, not the students." Rosenberger, 115 S. Ct. at 2548 n.11; see infra note 222.

n341. Rust, 500 U.S. at 200 ("It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government.").

n342. See Cole, supra note 137, at 692-93.

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[*1720]

Unlike the doctors in Rust, Wide Awake is not merely reluctant, but unwilling. Whereas the doctors in Rust accepted conditional funding, Wide Awake refused to serve as a conduit for the University's educational purpose so it could receive funding. That distinction should not obscure the nearly perfect parallel between Wide Awake and the doctors: both want state money, and neither aspires to the position of state agent. Most importantly, the doctors and Wide Awake share a distaste for the state's messages: abortion is undesirable, and religious groups are not educational. Formalistic distinctions of the type relied upon by the Court of Appeals and Rosenberger majority aside, Rust and Rosenberger are of the same cloth.

Conclusion

The Establishment Clause is Rosenberger's red herring. The battle at rock bottom does not hinge on church/state relations, but on whether the judiciary can displace a university's academic judgments at the request of political discontents or groups that have failed to convince a university of their educational value vis-a-vis rival organizations. Practical considerations compel the conclusion that a system of judicial revaluation of a university's policy choices is ultimately unworkable. Rosenberger's conflation of viewpoint-based discrimination (Catholics, but not Protestants, excluded from university funding) and subject-matter discrimination (religion, but not philosophy, excluded from university funding), not only undermines public university governance, but also gives rise to further incoherence in free speech jurisprudence. As for the philosophical rejoinder - The marriage of Robert Bork and Stanley Fish; "Politics is a good thing;" n343 - Let's put Wide Awake to rest.

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n343. Larry Sabato, Robert Kent Gooch Professor of Government and Foreign Affairs, University of Virginia. Professor Sabato's motto - "politics is a good thing" - is emblazoned on t-shirts worn by University students.

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LEVEL 1 - 85 OF 96 ITEMS

Virginia Law Review

October, 1994

80 Va. L. Rev. 1515

LENGTH: 65146 words

ESSAY: PLATONIC LOVE AND COLORADO LAW: THE RELEVANCE OF ANCIENT GREEK NORMS TO MODERN SEXUAL CONTROVERSIES*

* This Essay was delivered as a McCorkle Lecture at the University of Virginia Law School. I would like to thank Julia Annas, Douglas Baird, Myles Burnyeat, Victor Caston, David Cohen, Andrew Koppelman, Elena Kagan, Kenneth Karst, David Konstan, Anthony Price, David Strauss, and Cass Sunstein for their helpful comments on a previous draft, and Christopher Bobonich, Terence Irwin, Anthony Price, and Richard Sorabji for giving me written statements on points of scholarship. I am especially grateful to Kenneth Dover for his detailed comments on my draft, and, even more, for his generous assistance and his written statements on many points relevant to the issues surrounding this trial. Previously unpublished statements by Dover will be found throughout the Essay, and a co-authored statement detailing our agreement on points relating to the issues in the Essay will be found as Appendix 4.

All translations from the Greek are my own, unless otherwise noted.

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SUMMARY:

... They attended the Dean's translation class, and when one of the men was forging quietly ahead Mr. Cornwallis observed in a flat toneless voice: "Omit: a reference to the unspeakable vice of the Greeks." ... Almost no sexually explicit passage was available in anything like a faithful translation until very recently. ... This would be a strange thing for a Greek to say; it would also be strange for a Greek to suggest that pleasure in an active homosexual role is "disease-like' or unlikely to be experienced except in consequence of involuntary habituation; the example of the passive sexual role of women as naturally-determined behaviour which cannot be reproached as a lack of control over bodily pleasure indicates that Aristotle's mind is running on the moral evaluation of sexual passivity .... The Greeks were well aware that many homosexual relationships did what the participants hoped and imagined, neither more nor less. ... Where there is a history of dispute about the meaning of a word or phrase in a given passage, how does one proceed? One must first of all know one's author as well as one can and be steeped in that author's usage of Greek. ... Relationships in which sexual conduct occurred were widely regarded as sources of love and intense pleasure for the older male, of affection and education for the younger. ...

TEXT:
[*1515]

I

IN E.M. Forster's novel Maurice, two young men, strongly attracted to each other, begin their university study of Plato:

They attended the Dean's translation class, and when one of the men was forging quietly ahead Mr. Cornwallis observed in a flat toneless voice: "Omit: a reference to the unspeakable vice of the Greeks." Durham observed afterwards that he ought to lose his fellowship for such hypocrisy.

Maurice laughed.

"I regard it as a point of pure scholarship. The Greeks, or most of them, were that way inclined, and to omit it is to omit the mainstay of Athenian society."

"Is that so?"

"You've read the Symposium?"

Maurice had not, and did not add that he had explored Martial. [*1516]

"It's all in there - not meat for babes, of course, but you ought to read it. Read it this vac."

... He hadn't known it could be mentioned, and when Durham did so in the middle of the sunlit court a breath of liberty touched him. n1

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n1. E.M. Forster, Maurice 51 (1981).

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In 1990, a conservative American judge, a Reagan appointee to the United States Court of Appeals for the Seventh Circuit, fulfilled Clive Durham's assignment, reading the Symposium for the first time in order to "plug one of many embarrassing gaps in [his] education." n2 In his 1992 book Sex and Reason, Richard Posner describes the impact of this experience:

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n2. Richard A. Posner, Sex and Reason 1 (1992).

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I knew it was about love, but that was all I knew. I was surprised to discover that it was a defense, and as one can imagine a highly interesting and articulate one, of homosexual love. It had never occurred to me that the greatest figure in the history of philosophy, or for that matter any other respectable figure in the history of thought, had attempted such a thing. It dawned on me that the discussion of the topic in the opinions in Bowers v. Hardwick ... was superficial n3

Discussing those opinions later in his book, Posner argues that they betray both a lack of historical knowledge and a lack of "empathy" for the situation of the homosexual, the two being closely connected: "The less that lawyers know about a subject, the less that judges will know; and the less that judges know, the more likely they are to vote their prejudices." n4 Thus, he suggests that the "irrational fear and loathing" expressed in the Georgia statute under which Michael Hardwick was prosecuted and endorsed in the opinions upholding it might have been dispelled by a study of history - beginning, it would appear, with a study of Plato. n5 Sex and Reason [*1517] was his own attempt to advance this educational process, and "to shame my colleagues in the profession" for failing to educate themselves in this area. n6 Subsequently, Posner has shown the effects of his own classical education: in a recent blackmail case he speaks eloquently and with empathy of the special vulnerability of the closeted homosexual in contemporary American society, describing in some detail the unnecessary and nonuniversal character of the prejudices that make this class of persons so painfully susceptible to the blackmailer's schemes. n7

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n3. Id. (footnotes omitted). Posner here says that the superficiality of the opinions does not imply that the decision is wrong, id. at 1-2, but he does subsequently argue for that position, see infra notes 4-7 and accompanying text.

n4. Posner, supra note 2, at 347.

n5. Id. at 346. Posner states:

Statutes which criminalize homosexual behavior express an irrational fear and loathing of a group that has been subjected to discrimination, much like that directed against the Jews, with whom indeed homosexuals ... were frequently bracketed in medieval persecutions.... There is a gratuitousness, an egregiousness, a cruelty, and a meanness about the Georgia statute that could be thought to place it in the same class with Connecticut's anticontraceptive law ....

Id.

n6. Id. at 4.

n7. United States v. Lallemand, 989 F.2d 936 (7th Cir. 1993). The question before Posner was whether Lallemand, who had deliberately set out to blackmail a married homosexual, deserved an upward departure in sentencing under the Federal guidelines for what is called an "unusually vulnerable victim": given that all blackmail victims are persons with guilty secrets, what was special about this one, a married government employee with two grown children (who had attempted suicide when approached by Lallemand with the blackmail demand)? The answer lay, Posner reasoned, in current American mores, which treat this sexual secret as

different from many others. See id. at 940.

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On October 15, 1993, I found myself on the witness stand in a courtroom in Denver, Colorado, telling Colorado District Judge H. Jeffrey Bayless about Plato's Symposium. Because I had a very short time to testify as an expert witness, I focused above all on the speech of Aristophanes, which I had elsewhere argued to be one of the speeches in which Plato expresses views that he wishes his reader to take especially seriously. n8 I told the court the story of how human beings were once round and whole - but now, cut in half for their overambitiousness, they feel a sense of lost wholeness and run about searching for their "other half." n9 There are, Aristophanes tells us, three types of search, corresponding to three original species of human beings. There are males whose other half is male, females whose other half is female, and people whose other half is of the opposite sex. The speech describes the feelings of intimacy and joy with which the lost other halves greet one [*1518] another, n10 and describes the activity of sexual intercourse as a joyful attempt to be restored to the lost unity of their original natures. This is so no less for the same-sex than for the opposite-sex couples: in all cases, lovemaking expresses a deep inner need coming from nature, and in all cases the couples, so uniting, have the potential to make a valuable civic contribution. n11 Through this text and many others, I suggested that a study of history reveals a wide variety of judgments and reasoned arguments about same-sex acts and attachments, obliging us to examine our own judgments and arguments in this area and the extent to which they are based on reason.

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n8. See Martha C. Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy 171-76 (1986).

n9. Plato, Symposium 189c-193d (Sir Kenneth Dover ed., 1980) [hereinafter Dover Symposium].

n10. Id. at 192b-c ("They are struck in a wonderful way with friendly love and intimacy and passionate desire, and are hardly willing to be apart from one another for even a short time.").

n11. Aristophanes clearly prefers the male-male pairs, whom he characterizes as motivated to intercourse "not by shamelessness but by bravery and courage and manliness, welcoming one who is similar to themselves." Id. at 192a. He claims that only this sort become politikoi (politicians or political men) and says that they will marry only if coerced by the law. Id. at 192b. But his description of the joyful love of the reunited "other halves" is explicitly said to apply to all three types: "both the lover of youths and any other one." Id. at 192b7.

Kenneth Dover, in his note on this passage, argues that Aristophanes' remark about the eromenoi (younger partners) in male-male couples becoming politikoi is a joke, along the lines of other jokes in comedy that make fun of an alleged similarity between politicians and those who give sex for money. See id. at 118; see also Aristophanes, Clouds 1093-1100 (where the joke is that politicians - and most of the audience - are all euruproktoi, or "wide-anused"). But in that case we would not expect Aristophanes to say, as he does, that the eromenoi,

when older, become active erastai (lovers, i.e., active older partners); we would expect him to focus on chronic passivity, as he does not. Nor would we expect him to insist seriously, as he does, that these are the bravest and most manly of lovers. See Dover Symposium, supra note 9, at 192a. Because Aristophanes' statements about the manliness of male-male couples are so much in line with what Phaedrus and Pausanias seriously say, it would be difficult for a reader to take them as joking, without a much clearer signal. I would therefore argue that we have Plato making fun of his foe Aristophanes by putting his own serious ideas (ideas Aristophanes would have treated cynically) into Aristophanes' own mouth. Dover now agrees with this argument. See Letter from Sir Kenneth Dover, Chancellor, University of St. Andrews, to Martha Nussbaum (Mar. 29, 1994) (on file with the Virginia Law Review Association).

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Taking my Colorado experience as a basis, I shall argue that ancient Greek texts relating to sexuality are radical and valuable for us in just the way Clive Durham and Richard Posner say they are. They have the potential to make a substantial contribution to our contemporary legal and moral thought in four ways. First, they force us to confront the fact that much of what we consider neces [*1519] sary and natural in our own practices is actually local and nonuniversal; this, in turn, forces us to ask whether we have good reasons for what we legislate and judge. Second, the texts help us question certain empirical claims commonly made in this domain today, such as the claim that wide toleration of same-sex acts and relationships will subvert the family and the social fabric. Third, the Greek texts provide us with valuable concrete arguments concerning the important human goods a sexual relationship of this sort may promote. Fourth, the texts promote what Posner found so sorely lacking in recent judicial treatments of this topic: empathy for the hopes and fears and human aims of those involved in such relationships.

I shall first introduce the Colorado case. I shall then characterize as well as I can in a discussion of this length what a study of ancient Greek culture and its philosophers has to offer us on this topic. I shall then return to my four arguments, confronting, in the process, various objections that may be made to the ancient-modern comparison. Finally, I shall conclude with a very Platonic defense of the use of reason and argument.

II

In 1992 the State of Colorado passed by referendum, with the support of fifty-three percent of those who voted, what is now famously known as Amendment 2: n12 an amendment to the state constitution that made it illegal for any state agency or any local community within the state to

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n12. Colo. Const. art. II, 30b (ruled unconstitutional in Evans v. Romer, 63 Empl. Prac. Dec. (CCH) 42,719 (Colo. Dist. Ct. Dec. 14, 1993), aff'd, Nos. 94SA48, 94SA128, 1994 WL 554621 (Colo. Oct. 11, 1994)).

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adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. n13

Because Aspen, Boulder, and Denver had in fact passed civil rights ordinances aimed at protecting lesbians and gays from discrimina [*1520] tion, the Amendment nullified those ordinances. A group of plaintiffs went to court for a preliminary injunction against the law. Judge Bayless granted the injunction, n14 which the Colorado Supreme Court upheld by a 6-1 vote. n15 The Supreme Court sent the case back for trial, holding that the State must show that Amendment 2's prohibition of special protections on the basis of homosexual or bisexual orientation is "supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible." n16 Strict scrutiny was warranted, they argued, because Amendment 2 burdens the "fundamental right" of political participation by fencing out an "independently identifiable" group from the equal exercise of that right. n17 On [*1521] remand, the case was heard by Judge Bayless, who had originally granted the injunction. On December 14, he found in favor of the plaintiffs, declaring Amendment 2 unconstitutional. n18

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n13. Id.

n14. See Evans v. Romer, 60 Empl. Prac. Dec. 41,998 (Colo. Dist. Ct. Jan. 15, 1993).

n15. See Evans v. Romer, 854 P.2d 1270 (Colo.), cert. denied, 114 S. Ct. 419 (1993). Bayless' legal argument was rejected by the Colorado Supreme Court, which, however, concurred in his view that strict scrutiny was warranted. Id. at 1286.

n16. Id. at 1275 (citing Plyler v. Doe, 457 U.S. 202, 217 (1982)).

n17. Id. at 1282. The argument rests on a group of cases involving reapportionment, minority party rights, and various other attempts to "limit the ability of certain groups to have desired legislation implemented through the normal political processes." See id. at 1276. The court centrally focused on Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982), but its consideration went well beyond these cases. The court argued that, although these political participation cases involved racial issues, the core of the argument employed did not rest on the notion of suspect classification, but rather established a general principle that "the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny." Evans, 854 P.2d at 1276.

The articulation of the notion of an "independently identifiable group" was assisted by analysis of the Supreme Court's discussion of Hunter in Gordon v. Lance, 403 U.S. 1 (1971), in which a state provision requiring a supermajority for bond issuance referenda was upheld. Distinguishing Hunter, the Gordon Court held that strict scrutiny was not warranted because the class of citizens affected - those in favor of certain bond issues - was not an "independently identifiable group or category." Id. at 5. This showed, the Colorado Supreme Court argued, that the U.S. Supreme Court did not regard Hunter as resting solely on the notion of traditionally "suspect classification": if it had, it would not have needed to argue that the plaintiffs were not an "independently identifiable" group, and the notion that Hunter could be used to invoke strict scrutiny could have been dismissed summarily. See Evans, 854 P.2d at 1282.

The notion of "independently identifiable" was further spelled out in Gordon as involving an idea of "those who would benefit from laws barring racial, religious, or ancestral discriminations." See Gordon, 403 U.S. at 5 (quoting Hunter, 393 U.S. at 391). The Colorado Supreme Court argued that a related idea could be found in the Evans case. On this basis, the Colorado court concluded that homosexuals and bisexuals do fall under the category of "independently identifiable" group demarcated (albeit in an inchoate manner) by the U.S. Supreme Court:

Amendment 2 expressly fences out an independently identifiable group.... Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden ....

... Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them.

Id. at 1285.

n18. Evans v. Romer, 63 Empl. Prac. Dec. (CCH) 42,719, at 77,940 (Colo. Dist. Ct. Dec. 14, 1993), aff'd, Nos. 94SA48, 94SA128, 1994 WL 554621 (Colo. Oct. 11, 1994).

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In its brief, the State had explored six different avenues in support of its claim that a "compelling interest" was at stake: the interests mentioned included preventing the government from interfering with personal, familial, and religious privacy, and promoting the physical and psychological well-being of children. n19 The State argued that each of these, taken singly, was compelling and, even if none was found to be compelling taken singly, they might be found to be compelling taken in the aggregate. n20 The State claimed that a seventh compelling interest, an interest in "public morality," "pervaded" the other six, and later asked for a reconsideration of Judge Bayless' ruling on the grounds that this interest should be given independent adjudication. n21 Bayless ruled in favor of the plaintiffs n22 and declined to reconsider. [*1522]

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n19. See Defendants' Trial Brief at 59-75.

n20. Id. at 76.

n21. See Defendants' Trial Brief at 56 ("Importantly, the issue of public morality, which has been at the crux of this litigation since its inception, permeates the discussion of compelling interests and indeed, can be regarded as a compelling interest in its own right."); Defendants' Motion for Reconsideration and to Alter or Amend Judgment at 1-2.

n22. Evans, 63 Empl. Prac. Dec. (CCH) at 77,930. Bayless found that the following alleged "compelling interests" were not, in fact, compelling and/or were not furthered by Amendment 2: (1) deterrence of factionalism - concerning which Bayless wrote that "the opposite of defendants' first claimed compelling interest is most probably compelling," in the sense that vigorous political debate at the local level, not the removal of that debate, is a compelling interest, id. at 77,934; (2) the "preservation of the State's political functions," allegedly under threat from "militant gay aggression" - Bayless denied that this threat had been established, id. at 77,934-935; (3) the preservation of the ability of the state to remedy discrimination against groups which have been held to be suspect classes - Bayless denied that this interest was threatened by the antidiscrimination laws that Amendment 2 nullified, id. at 77,935-936; (4) the prevention of government from subsidizing the political objectives of a special interest group - for which Bayless found no authority or logical support, id. at 77,937; and (5) the promotion of the "physical and psychological well-being of children" - concerning which Bayless stated that he was convinced by plaintiffs' evidence that children are far more likely to be molested by heterosexuals than homosexuals, and that therefore Amendment 2 did not further this interest, id. at 77,937-938. The only interests Bayless found both compelling and furthered by Amendment 2 were the interests in "the promotion of religious freedom and the promotion of family privacy." Id. at 77,936. But he found that Amendment 2 was not "narrowly drawn to achieve that purpose in the least restrictive manner possible." Id. at 77,937. Religious freedom, he noted, might have been adequately served by granting an exemption from nondiscrimination statutes for religious organizations, as Denver and Aspen had in fact done. Id. As for family values, he stated: "Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group." Id. Although Bayless ruled in favor of the plaintiffs on the main line of argument, holding that the Amendment burdened the fundamental right of political participation and that the State had failed to show that the Amendment served a compelling state interest (and was narrowly drawn so as to achieve that purpose in the least burdensome matter possible), Bayless ruled against the plaintiffs on the issue of whether homosexuality was a suspect classification - an ancillary line of argument on which the plaintiffs had also asked him to rule. Here Bayless held that, although a "history of discrimination" had been amply demonstrated, "political powerlessness" had not. Id. at 77,939-940. He declined to rule on the question of whether Amendment 2 was constitutional under the weaker "rational basis" standard, arguing that one is not entitled to apply that standard when one holds, as he did, that a fundamental interest is involved and that strict scrutiny is therefore warranted. Id. at 77,940.

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In the course of attempting to establish these interests, the State called a wide range of expert witnesses whose arguments were contested by expert witnesses for the plaintiffs. To cite just one example that played an important role in the State's argument, psychological testimony alleging that homosexuals are highly likely to be child molesters was contested by Dr. Carol Jenny, Denver director of child advocacy, who testified that children are 100 times more likely to be molested by the heterosexual partner of a relative than by a gay or lesbian relative. n23 But the State's claims regarding its interest in the family and in the well-being of children were supported, as well, by a number of philosophical expert witnesses who offered moral arguments connecting homosexuality to the undermining of the family and of the social fabric. Prominent among these experts were political philosophers Harvey Mansfield of Harvard University, John Finnis of Oxford University, and Robert George of Princeton University. The expert witness statements these witnesses submitted suggested that part of their testimony would involve testimony about the moral thought of Plato and Aristotle: in different ways, all three of these witnesses claimed to [*1523] derive support from the Greek tradition for their arguments in support of Amendment 2.

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n23. See id. at 77,937.

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I was called in initially in my capacity as expert on the moral thought of Plato and Aristotle to rebut those claims and to establish the difference between the ancient Greek tradition and the use made of it in the testimony of expert witnesses for the State. n24 At the same time, in my capacity as expert in moral philosophy, I was asked to offer criticism of the moral arguments as arguments. These two tasks were easy to connect, for I argued that the actual arguments of the Greeks provide us with good resources for criticizing the arguments put forward by the State's witnesses.

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n24. Both at the outset and throughout the trial, it continued to be the plaintiffs' position that this testimony about moral philosophy was irrelevant to the case. See Plaintiffs' Motion in Limine at 8-10; Plaintiffs' Supplementary Memorandum on the Legal Status of "Morality" as a Governmental Interest at 2 ("Moral norms are legitimate public purposes only when they are linked in some way with the preservation of public welfare and public order."). On this basis, the plaintiffs sought to exclude the testimony of the defendants' expert witnesses in moral philosophy, including John Finnis, David Novak, Hadley Arkes, Barry Gross, and Harvey Mansfield. See Plaintiffs' Motion in Limine at 8. (Robert George was not named, presumably because, as a member of the U.S. Civil Rights Commission, he offered testimony bearing on other issues as well.) The defendants insisted vigorously on the importance of this testimony, and these witnesses, to their case; Judge Bayless found in their favor. At this point, the plaintiffs decided not to let the testimony go by without rebuttal, and my role began.

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Finally, because Finnis, a law professor, also made claims about current developments in European law relating to homosexuality, n25 I was asked to testify on a different topic. Since 1986, I have been a consultant at a research institute connected with the United [*1524] Nations and located in Helsinki, Finland, directing a project on quality of life assessment. In the process I have studied not only Scandinavian family law but also the actual situation of families and children, especially in Finland. Recently, four of the five Scandinavian countries, having already protected homosexuals from discrimination, have also adopted some form of domestic partner registration for same-sex couples in order to give these couples the tax, inheritance, and other civic benefits of marriage. Finland, the fifth, is currently drafting such legislation, which has the support of both the Conservative and the Social-Democratic parties. A major part of my testimony involved a discussion of these developments and their impact on the lives of children and the social fabric. n26 This is a fascinating topic, and one that pertains more directly to Colorado law than does ancient Greek history. I believe that my testimony on that topic was more important than my historical testimony. n27 But now, for the remainder of this Essay, I turn to the Greeks.

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n25. Finnis described what he termed the "standard modern European position" with regard to same-sex relations, according to which

the state is not authorized to, and does not, make it a punishable offense for adult consenting persons to perform homosexual acts in private. But states do have the authority to discourage homosexual conduct and "orientation" (i.e., overtly manifested active willingness to engage in homosexual conduct) and typically, though not universally, do so by various criminal and administrative laws and policies, many of which discriminate (i.e. distinguish) between heterosexual and homosexual conduct adversely to the latter.

Affidavit of John Mitchell Finnis 8 [hereinafter Finnis Affidavit]. Finnis connected the two parts of his testimony by arguing that "the standard modern position has substantial similarities with the position in Athens in the fourth-century BC." Id. 22. The core of Finnis' position has now been published in John M. Finnis, Law, Morality, and "Sexual Orientation," 69 Notre Dame L. Rev. 1049 (1994) [hereinafter Finnis Article]. Much of the article is taken verbatim from the affidavit. I shall continue to refer to the fuller versions of Finnis' position in his affidavits, except where there are new observations that I wish to discuss.

n26. This material is summarized in Affidavit of Martha C. Nussbaum 75-88. Especially fascinating, I believe, is the lengthy preamble to the Norwegian Act on Registered Partnerships for Homosexual Couples (1993), which affirms conclusions similar to mine in this Essay: that same-sex relationships can involve deep emotional ties and can promote genuine human goods; that prejudice against homosexuals is highly correlated with ignorance of homosexual people; that the primary source of conflict in the lives of homosexuals is the intolerance of society. See id. ch. 1. The report cites the support of the Faculty of Theology at the University of Oslo, of the Hygen Committee in the Church of Norway, and of working groups established by the General Synod of the Church of Sweden. See id. ch. 4.4.

n27. Neither issue figured explicitly in Bayless' opinion, but he did note the difficulty of arriving at an adequately inclusive definition of "family," see Evans, 63 Empl. Prac. Dec. (CCH) at 77,937, something I had stressed in my testimony about Scandinavia and my United Nations work. The Greeks, by contrast, were not mentioned in the opinion at all. I think that Bayless was clearly right not to rely on this issue in actually deciding the case, though of course once he had admitted this testimony it was right for the plaintiffs to rebut it.

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I shall focus most closely on the arguments of one of the State's witnesses, John Finnis, because he was the one who testified about the Greeks most extensively. I shall also mention testimony by Robert George that amplifies Finnis' position, and a related argument by Harvey Mansfield. [*1525]

III

Finnis' moral argument, one he traces to "Plato and those many philosophers who followed him," n28 begins from the premise that it is morally bad to use the body of another person as an instrument for the purpose of one's own private pleasure or satisfaction. n29 Although the legal relevance of this claim remains unclear to me, it is at least a plausible moral contention. He then continues with the assertion that a sexual relationship is able to avoid this sort of manipulative use of another person only through the openness to procreation characteristic of a marital relationship in which no artificial contraception is used:

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n28. Finnis Affidavit, supra note 25, 47.

n29. Id. 46.

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Marriage, with its double blessing - procreation and friendship - is a real common good. Moreover, it is a common good which can be both actualized and experienced in the orgasmic union of the reproductive organs of a man and a woman united in commitment to that good. Conjugal sexual activity, and - as Plato and Aristotle and Plutarch and Kant all argue - only conjugal activity is free from the shamefulness of instrumentalisation which is found in masturbating and in being masturbated or sodomized. n30

All beliefs on the part of nonmarried couples that they are in fact actualizing a "common good" such as love or friendship are called "the pursuit of an illusion," n31 on the grounds that there is no "biological reality" n32 to the uniting that takes place, as there is in the "orgasmic union of the reproductive organs of husband and wife." n33 Finnis goes on to argue that such relationships are not merely unproductive, but actually destructive of the personalities of the participants n34 and also

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n30. Id.

n31. Id. 47.

n32. Id.

n33. Id.

n34. See, e.g., id. 34 (homosexual activity "harms the personalities of its participants by its dis-integrative manipulation of different parts of their one personal reality").

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deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage.... [*1526]

... All who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments to be put to whatever suits the purposes of the individual "self" who has them. Such an acceptance is commonly (and in my opinion rightly) judged to be an active threat to the stability of existing and future marriages n35

A community concerned with the future of marriage and the family may, therefore, "rightly judge that it has a compelling interest in denying that homosexual conduct is a valid, humanly acceptable choice and form of life, and in doing whatever it properly can, as a community ... to discourage such conduct." n36 [*1527]

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n35. Id. 52-53. The inference "must, if consistent ..." is puzzling, for it would be an error to infer that someone who regards x as sometimes or often a good must, if consistent, regard it as good in all circumstances. I owe this observation to Kenneth Dover. See Letter from Kenneth Dover, Chancellor, University of St. Andrews, to Martha Nussbaum 1-2 (May 11, 1994) (on file with the Virginia Law Review Association) [hereinafter Dover Letter III]. I find no argument in Finnis' affidavit to fill this gap.

n36. Finnis Affidavit, supra note 25, 53. Finnis did not testify in person. Longer extracts from this document, together with a small portion of my expert witness statement prior to my testimony, can be found in John Finnis & Martha Nussbaum, Is Homosexual Conduct Wrong? A Philosophical Exchange, New Repub., Nov. 15, 1993, at 12. Although Finnis here focuses on homosexual conduct, his affidavit strongly suggests that he would support Amendment 2 where sexual "orientation" is concerned, as well, insofar as "orientation" is understood as a readiness to engage in sexual conduct. Although his own moral position strongly separates sexual relationships that have full genital expression from those that do not, he holds that

the phrase "sexual orientation" is radically equivocal. Particularly as used by promoters of "gay rights," the phrase ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one towards homosexual activity; (II) the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in homosexual activity and/or forms of life which presumptively involve such activity.

Finnis Affidavit, supra note 25, 24. Finnis' position appears to be that although (I) ought not to be a ground of public discrimination, so long as the parties do not manifest a willingness to perform sexual acts, (II) may be such a ground. It is not altogether clear how he would apply this distinction to some of the actual cases that have involved orientation rather than conduct - to the case of Joe Steffan, for example, who did not manifest his orientation in any known manner other than declarative speech. See Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (holding regulation under which Navy compelled midshipman to resign from Naval Academy solely because he admitted homosexual orientation violated the Equal Protection Clause). Many cases in which known homosexuals are denied jobs, housing, and so forth are of this sort. It is also unclear precisely how Finnis would regard public erotic displays, such as kissing and hand-holding, from which intent to pursue the caresses to orgasm cannot be inferred. Such caresses have been crucial in recent cases involving the military. And they seem highly relevant to his treatment of Plato. See infra text accompanying note 250-55.

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There is no doubt that Finnis condemns, in the same terms as homosexual acts and by the same argument, a number of other sexual acts: solitary masturbation, all extramarital and nonmarital sex acts between men and women, and, finally, all artificially contracepted sex acts within heterosexual marriage. This aspect of the Finnis-George position was made evident when Robert George of Princeton, having defended a moral position in all important respects like that of Finnis, testified that a landlord who has reason to believe that a prospective tenant would commit any of the prohibited acts on his premises would be within his rights to refuse to rent the apartment, because he would otherwise be morally coopted by association with the acts of his tenant. I quote from George's sworn testimony in his pretrial deposition:

Q. Do you believe that a landlord may properly refuse to rent an apartment to a married couple whom he knows uses birth control when they engage in sexual intercourse that would take place in the apartment that he would rent to them?

A. And he thinks that this is going to happen in the apartment? Yes.

....

Q. And you believe that it would be appropriate for a landlord to refuse to rent an apartment to a man whom the landlord believed would masturbate inside the apartment?

A. Yes. If that's what he thought was going to happen, yes. n37

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n37. Deposition of Robert George at 99-100. One might, of course, sympathize with George's position on religious-freedom or freedom-of-association grounds without agreeing with Finnis and George that these sexual acts are immoral. In that sense, George's argument appears to depend less than does Finnis' on the claim that homosexual acts are in fact immoral.

Concerning the Finnis/George position on both homosexuality and contraception, classical scholar Anthony Price comments as follows:

It is admitted that the natural-law argument tells no more strongly against homosexuality than it does, for instance, against the practice of contraception. To use it to justify discrimination that is only against gays is to justify unjust discrimination. Even to use it against gays as well as against others would arguably be unfair in that gays, unlike many heterosexuals, do not choose to make their love-making sterile. Of course Finnis and others are well aware that what motivated popular support for Amendment 2 was not respect for the natural law as they interpret it, but attitudes of prejudice and antipathy that contradict the heart of Christian morality.

... I do not expect that Finnis' testimony has mentioned the following facts. At least in England (but I presume also in the States), the papal teaching that excludes contraception is not only alien to the Anglican tradition, but an embarrassment to most Roman Catholics. Unlike the ban on abortion, which most Catholic laymen strongly endorse, the ban on contraception is widely disregarded even by practising Catholics. The English bishops accepted that long ago, soon after the publication of Humanae Vitae, when they adopted the so-called "pastoral solution': lay people who practise contraception in good conscience need not mention it in confession. To call Finnis' argument sectarian would be to exaggerate its acceptability; that he intends it to guide U.S. state law seems, across the Atlantic, utterly bizarre.

Open Letter from Anthony Price, Lecturer in Philosophy, University of York, to Martha Nussbaum 2 (Dec. 12, 1993) (on file with the Virginia Law Review Association) [hereinafter Price Letter I].

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[*1528]

I note that in his December opinion Judge Bayless referred to a closely related argument about landlords as it applied to homosexual acts, saying: "No authority is offered for this fairly remarkable conclusion, and none has been found.... This claimed compelling interest was not supported by any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest." n38 But now I return to Finnis and to Plato. n39 [*1529]

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n38. Evans v. Romer, 63 Empl. Prac. Dec. (CCH) 42,719, at 77,937 (Colo. Dist. Ct. Dec. 14, 1993) (citing Defendants' Trial Brief at 69), aff'd, Nos. 94SA48,

94SA128, 1994 WL 554621 (Colo. Oct. 11, 1994). One should not imagine, however, that the issue is a mere frivolity. In Massachusetts a case of this kind is currently in the courts. See Commonwealth v. Desilets, 636 N.E.2d 233 (Mass. 1994); see also Patricia Nealon, Battle Lines Drawn as Notion of "Living in Sin" Goes to Trial, Boston Globe, Feb. 5, 1994, at 1 (describing the facts of the Desilets case). A Catholic landlord refused to rent to an unmarried couple on the grounds that this would infringe on his freedom of religion. The couple charged that he had violated the state's antidiscrimination statute, which forbids discrimination based on marital status. A lower court held in favor of the landlord. On appeal, the Supreme Judicial Court vacated the lower court's grant of summary judgment in favor of the defendants and remanded the case. See Desilets, 636 N.E.2d at 243.

n39. Finnis, rebutting an affidavit submitted for the plaintiffs by Steven Macedo, insists that he does not "put contracepted sexual intercourse between spouses on a par with same-sex sex acts." Rebuttal Affidavit of John Mitchell Finnis 30 [hereinafter Finnis Rebuttal]. The former, he argues, is at least intended by the parties to contribute to the maintenance of a marriage, whereas same-sex acts, "by contrast, cannot contribute or even be intended to contribute to the maintenance of marriage - a committed partnership adapted not only to friendship but also to the procreation and education of children, and actualized and experienced as such by the partners in their genital intercourse." Id. It is more than a little unclear why Finnis feels able to invoke the parties' intentions in this case, having resolutely denied the relevance of such appeals in the homosexual case. Homosexuals may of course intend to form a committed marriagelike relationship, and it is very unclear how a heterosexual couple who deliberately and systematically block procreation through artificial contraception differ in intention from a similarly committed same-sex couple. One may add that the latter may in fact choose to have and raise children, whether biological or adoptive. Nor do these statements tell us whether Finnis would dissent from George's view regarding landlords; George, at any rate, treats artificial contraception and same-sex relations similarly for the purposes of that argument. See Deposition of Robert George at 96-99. Finally, Finnis does not consider the possibility that contracepted sex is good not just because it contributes to the maintenance of a marriage but also because it contributes to human goods such as pleasure, love, and communication, goods that may also be present in nonmarital unions.

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Finnis does introduce an exception for the case of the unwillingly sterile married couple, admitting that the sexual acts of such couples can realize genuine goods of friendship and love. n40 This move raises some deep questions about the consistency of his reasoning when he denies that other nonchildbearing unions can realize such goods. But clearly it does not represent a concession to such other unions, nor does it remove procreation from its position of centrality in his moral argument. In his most recent affidavit, he defines marriage as "a committed partnership adapted not only to friendship but also to the procreation and education of children, and actualized and experienced as such by the partners in their genital intercourse." n41 Furthermore, his argument as to why the genital activity of same-sex acts cannot actualize a "common good" refers centrally to the absence of a "biological" unity between the two partners. n42 This is the only argument I can find in his affidavit for the conclusion that same-sex acts are "inevitably and radically nonmarital in character." n43 In short, Finnis' fundamental objection to same-sex relations

is that they are "nonmarital." And what does he mean by "marital"? He means, "adapted not only to friendship but also to the procreation and education of children." n44 [*1530]

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n40. Finnis Affidavit, supra note 25, 49. He mentions that the philosophers he cites "do not much discuss" this case. Id. The reason why this case is an exception is that such couples, whether impeded by age or by some other condition, do "function as a biological (and thus personal) unit and thus do actualize and experience the two-in-one-flesh good and reality of marriage .... The same cannot be said of a husband and wife whose intercourse is masturbatory, for example sodomitic or by coitus interruptus or fellatio." Id. (The apparent oddity of the "for example" in the second part of the last sentence is explained by the fact that Finnis argues that all sex acts not involving a marital biological unity are inherently masturbatory.)

n41. Finnis Rebuttal, supra note 39, 30.

n42. Finnis Affidavit, supra note 25, 48.

n43. Finnis Rebuttal, supra note 39, 29. He does add one further point: "Nor do those who favor stable homosexual relationships attempt any serious moral critique, on principle, of casual same-sex acts with various partners." Id. But it is on the biological unity point that he relies, as he must, to derive his conclusion that no homosexual conduct can actualize a common good.

n44. Id. 30.

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Finnis does allude with approval to one argument of quite a different character, an argument that does at least apparently distinguish same-sex acts from nonmarital heterosexual acts. This is the argument of Roger Scruton in his book Sexual Desire. n45 The argument is that sexual acts have greater value to the extent that they bring the partners into contact with greater "otherness" and difference, and that homosexuals, because they interact sexually with persons of the same sex, have thereby less sexual value in their acts than people who interact with partners of the opposite sex. n46 Although Finnis does not claim to find this argument in Plato and Aristotle, I shall criticize it later along with the arguments whose roots he does claim to find there, for I believe that the texts of Plato and Aristotle provide the material for a powerful rebuttal of this argument as well.

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n45. See Roger Scruton, Sexual Desire: A Moral Philosophy of the Erotic 284-321 (1986) (discussing various acts commonly termed "perversion"). Finnis' reference to this argument can be found in Finnis Affidavit, supra note 25, 51. I reviewed Scruton's book in Martha Nussbaum, Sex in the Head, N.Y. Rev. Books, Dec. 18, 1986, at 49 (book review), criticizing this argument among others. One problem with Scruton's argument is that he does not make clear the source of the standard of value he applies. He offers no support for the claim that homosexual relationships have less value than heterosexual relationships as seen from the point of view of those who participate in them; the source and warrant for the

external judgment of value is left uncertain.

n46. This is Scruton's actual argument. Finnis does not state this argument, but finds that Scruton assimilated homosexual conduct to forms of sexual conduct such as bestiality, necrophilia, and pedophilia, in which there is a loss of interpersonal "intentionality" and the sexual act is set "outside the current of interpersonal union." See Finnis Affidavit, supra note 25, 51. I think, however, it is plain that Scruton draws a sharp distinction between consenting adult homosexual acts and these other acts, and finds the former inferior to heterosexual acts through the argument I have stated. Nor does he apply his conclusion to female homosexual acts.

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One may wonder what difference it makes whether Finnis got the Greeks right. Ultimately, his argument must stand or fall on its own merits, not by any such appeal to authority, as must the argument that rebuts it. This is true even in the Catholic natural law tradition within which Finnis locates himself, for that religious tradition, unlike many others, places central emphasis on the role of reason in assessing moral claims. Surely reason must occupy pride of place in a secular court of law in the United States.

Therefore, as my testimony emphasized, it is possible to rebut the Finnis argument in general philosophical terms. It is important to insist that such matters should not be decided by appeals to cer [*1531] tain philosophical authorities, but instead by close scrutiny of the quality of the arguments offered. Clearly it would be wrong to suppose one could establish opposition to gays to be a legitimate interest and not merely a prejudice simply by showing that some famous philosopher or philosophers said so. No more can one legitimately use such appeals, without further argument, to conclude that it is a prejudice and not a legitimate interest. Nevertheless, I shall argue that getting the Greeks right does, in the ways I have suggested, help us in no small measure to get our own arguments right - by removing a false sense of inevitability about our own judgments and practices, n47 and by showing us moral arguments of great rational power.

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n47. See, e.g., K.J. Dover, Greek Sexual Choices, 41 Classical Rev. 161 (1991) (reviewing David M. Halperin, One Hundred Years of Homosexuality and Other Essays on Greek Love (1990)) ("Choice of sex-object has a history which becomes intelligible in proportion to our readiness to shed our belief in the inescapable naturalness of our own assumptions ....").

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IV

It is difficult to study Greek views of sexuality, for the reason so eloquently given by Forster: scholarly puritanism and evasiveness in this area have exerted a pernicious influence, eclipsing or distorting what Clive Durham quite rightly holds to be a straightforward matter of scholarship. The

omissions perpetrated by figures like Clive and Maurice's imaginary tutor - whether prompted by shame or by the desire to make the revered Greeks look more like proper Victorians - make their way into the editing and translating of ancient texts, into the making of lexica and other technical tools of scholarship, and thence into the interpretation and understanding of the ancient world. n48 Until very recently there were no reliable translations of Greek and Latin texts involving sexuality, and [*1532] no reliable scholarly discussions of the meanings of crucial words, metaphors, and phrases. As Kenneth Dover writes, in a document addressing the issues of scholarship that arose in the Amendment 2 trial: "On sexual behaviour, and homosexual behaviour in particular, translations and authoritative-sounding statements until quite recent times are not to be relied on, because turbulent irrationality impaired the judgement of translators and scholars." n49

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n48. See K.J. Dover, Greek Homosexuality at vii (rev. ed. 1989) [hereinafter Dover, Greek Homosexuality]. Dover states:

A combination of love of Athens with hatred of homosexuality underlies the judgments that homosexual relations were "a Dorian sin, cultivated by a tiny minority at Athens" (J.A.K. Thomson, ignoring the evidence of the visual arts) or that they were "regarded as disgraceful both by law and ... by general opinion" (A. E. Taylor, ignoring the implications of the text to which he refers in his footnote).

Id. In a personal communication, Dover calls Taylor's statement "grossly false." Letter from Kenneth Dover, Chancellor, University of St. Andrews, to Martha Nussbaum 2 (Feb. 11, 1994) (on file with the Virginia Law Review Association) [hereinafter Dover Letter I]. On the history of British classical scholarship on this topic, see Linda Dowling, Hellenism and Homosexuality in Victorian Oxford (1994).

n49. Dover Letter I, supra note 48, at 2.

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It is necessary to illustrate this situation, as otherwise the extent of distortion is difficult to credit. I can remember in my own graduate school days using the new scholarly edition of the works of the Roman poet Catullus prepared by C.J. Fordyce and issued from the prestigious Clarendon Press in Oxford in 1961. n50 Although this is an ambitious and in many ways exhaustive edition, it does not contain all the poems of Catullus: as the Preface states, "a few poems which do not lend themselves to comment in English have been omitted." n51 The book's jacket blurb, which I presume to have had Fordyce's approval, calls these poems "a few poems which for good reason are rarely read." The editor's principle of selection is of interest, for he included some fairly offensive scatological poems, as well as all poems dealing with heterosexual sexuality. It is same-sex acts and allusions to them that he believes inappropriate for English commentary. .

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n50. C.J. Fordyce, Catullus: A Commentary (1961).

n51. Id. at v.

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Nor in those days did the dictionary help the curious reader of those poems. If, for example, the reader of Catullus 16 wished to find out what was the meaning of pedico (it means "to play the insertive role in anal intercourse"), she would find "to practise unnatural vice." If, again, the reader wanted to know the meaning of irrumator (it means "one who plays the insertive role in oral intercourse"), she would find "one who practises beastly obscenity." n52 Yes, but which one, one wanted to know. This was basically [*1533] the situation across the board, although the Greek lexicon, prepared in the late nineteenth century by that excellent scholar Henry Liddell, was a good deal sounder here than its Latin counterpart. n53

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n52. Both entries are from A Latin Dictionary (photo. reprint 1980) (Charlton T. Lewis & Charles Short eds., Oxford, Clarendon Press 1879). Things were actually odder yet: the full entry for pedicare goes, "To practise unnatural vice. I. Of various forms of unnatural lewdness. II. Transf., of the tunic." Id. at 1288 (citations omitted). We are not told what form of unnatural vice is being practiced on the tunic. The Oxford Latin Dictionary (P.G.W. Glare ed., 1982) is better, but not good: pedicare is defined as "to commit sodomy with," id. at 1281, despite the fact that "sodomy" can designate both oral and anal sex acts, as the Latin verb cannot. As for the irrumator, he now is "one who submits to fellatio," id. at 969, which is not really the way the Romans saw things: the irrumator was clearly thought to be the active penetrative party, not one who passively "submits" to anything. The 1973 edition of Catullus by Kenneth Quinn gives precise definitions of these terms, but in Latin: "Literally, pedicare = mentulam in podicem inserere and irrumare = mentulam in os inserere." Catullus, The Poems 143 (Kenneth Quinn ed., 2d ed. 1973) (note on Poem 16). For a full scholarly treatment of these words and related matters, see J.N. Adams, The Latin Sexual Vocabulary (1982).

n53. There were various editions of this lexicon, the later ones including revisions by Henry S. Jones and a group of experts working with him. See Henry G. Liddell & Robert Scott, A Greek-English Lexicon (Sir Henry S. Jones ed., 10th ed. 1968).

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If we turn to the English translations in which most of the general public had to approach these authors, the situation was even more acute. Almost no sexually explicit passage was available in anything like a faithful translation until very recently. Thus, the humor of Aristophanes disappeared in great part from public view, and was not even well understood by expert scholars. When one opened the facing-page translations of the Loeb Classical Library volumes, the series used by Finnis throughout his affidavits, n54 one could frequently locate the parts translators thought obscene simply by looking to see what was not translated into English on the right-hand side. Thus, parts of Petronius' Latin remained in Latin on the right; parts of Longus' Greek were translated into Latin rather than English; and, most extraordinary of all, the explicit parts of the Latin poet Martial got turned into Italian on the right, as if the very presence of a foreign tongue supplied some protection for the student. It

seemed to be the view of the Loeb editors [*1534] that only the expert scholar could be trusted with these materials. n55 Although this made it remarkably easy for the curious young scholar to locate the sexy parts, it did have the effect of giving the public a badly distorted image of the culture of ancient Greece and Rome. I vividly remember the shock expressed in the local newspapers of Ypsilanti, Michigan in 1966 when a new professional repertory company staged a production of Aristophanes' comedy Birds, starring Burt Lahr and with me in a bit part, using the accurate translation of William Arrowsmith. The previously revered ancient Greeks had become a threat to the children of Michigan, and the rough reviews on this point caused Lahr to refuse to speak Arrowsmith's English, for fear that he would lose his contract advertising Lay's Potato Chips.

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n54. In his Rebuttal Affidavit, Finnis notes that he reads Latin "fluently" and knows "enough Greek to verify that the translations I employ are substantially accurate." Finnis Rebuttal, supra note 39, 5. If Finnis is using the Loebs for the Greek, he is doubly in error, for they are well known (in the case of Plato) to contain very poor editions of the Greek texts of that author, not supplied with the extensive critical apparatus that a scholar requires for serious work on the text. One cannot verify a translation by consulting a defective edition of the Greek text. It is also a bit difficult to know how one can assess a translation made by an expert without oneself being at least as "fluent" in the language as that expert.

n55. All of these cases have been revised. See, e.g., Michael Heseltine, Preface to Petronius at vii, viii (Michael Heseltine trans. & E.H. Warmington ed., rev. ed. 1969) ("All hitherto untranslated or "bowdlerized' passages have now been translated."); Longus, Daphnis & Chloe at vi (George Thornley trans. & J.M. Edmonds ed., rev. ed. 1978) ("Those passages of the translation which in previous impressions appeared in Latin have now been replaced by English renderings.") (editorial note); Martial, Epigrams (Walter C.A. Ker trans., rev. ed. 1968).

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The Greek and Roman philosophers were not immune from this activity. Several years ago I was invited by the trustees of the Loeb Classical Library to assess the reliability of all the translations of philosophical works from Plato through the Hellenistic period. I was not very surprised to discover that most of them were very bad, because it is well known in the scholarly world that the older Loeb volumes are very bad, both in text and in translation, and the central works of Plato, Aristotle, and Cicero were among the older Loebs. In the case of Plato a number of different translators had been involved, and one, Paul Shorey, had produced a version of the Republic that is still among the best; n56 but the versions of the Phaedrus by H.N. Fowler n57 and of the Symposium by W.R.M. Lamb n58 had serious defects, and those of the Laws n59 and Timaeus n60 by R.G. Bury were among the worst of the series. Indeed, quite apart from any issue of sex and morality, Bury's translations, [*1535] though they have some merit, especially in the context of their time, are too inaccurate in crucial matters of philosophical terminology to be a good basis for serious scholarship. n61 Bury's version of the Laws, n62 though somewhat closer to the Greek than the recent version of Trevor Saunders, which explicitly sets out to keep the reader's interest up by being nonliteral, n63 has been rightly

criticized by Thomas Pangle for casualness about consistency in the translation of important terms. n64 Although, as I shall argue in Appendix 2, Pangle's own version is not free from error, it is better than Saunders', principally because it does attend more often to consistency. We await a fully adequate version. Meanwhile, scholars may content themselves with those portions of the text excellently translated in the articles and the forthcoming book of Christopher Bobonich on the dialogue. I have dwelt on this point for a reason, and I shall return to it in Appendix 2. For now it will suffice to conclude that no good professional classical scholar relies on the Loeb versions of Plato, even for the Greek alone; those who use the Loebs for Plato are likely either amateurs or lacking confidence in their linguistic ability.

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n56. Plato, The Republic (Paul Shorey trans., 1937) [hereinafter Shorey Republic].

n57. Plato, Phaedrus, in 1 Plato 405 (Harold N. Fowler trans., 1928) [hereinafter Fowler Phaedrus].

n58. Plato, Symposium, in 5 Plato 73 (W.R.M. Lamb trans., 1925).

n59. Plato, Laws, in 10 Plato 3 (R.G. Bury trans., 1926) [hereinafter Bury Laws].

n60. Plato, Timaeus, in 7 Plato 1 (R.G. Bury trans., 1929).

n61. His version of Sextus Empiricus in the Loeb series, Sextus Empiricus (R.G. Bury trans., 1933-49), for example, gets both logic and epistemology wrong in crucial ways. Compare the fine literal version recently produced by Julia Annas and Jonathan Barnes: Sextus Empiricus, Outlines of Scepticism (Julia Annas & Jonathan Barnes trans., 1994).

n62. Bury Laws, supra note 59.

n63. Plato, The Laws (Trevor J. Saunders trans., 1970). Saunders argues that the translator of this work must be "something of a showman," Trevor J. Saunders, The Penguinification of Plato, 22 Greece & Rome 2d 19, 19 (1975), engaging deliberately in "overtranslations" that create "versions louder than the originals," id. at 23. He also supports "deliberate technical inaccuracy" in order to inject "idiom and colour" into Plato's "rather wooden" writing. Id. at 24. An appropriately stern criticism of this procedure may be found in Thomas L. Pangle, Preface to Plato, The Laws of Plato at ix, x-xii (Thomas L. Pangle trans., 1980).

n64. Pangle, supra note 63, at xii; see also the judgment of Richard Sorabji: "It would be useless to rely on the translations of ... Bury, who, whatever other merits he may have, does not observe the kind of accuracy required for understanding precise philosophical meaning." Open Letter from Richard Sorabji, Director, Institute of Classical Studies, University of London (Dec. 8, 1993) (on file with the Virginia Law Review Association) [hereinafter Sorabji Letter].

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My work assessing the Loebs revealed, among other errors, many cases of evasiveness and inaccuracy in matters of sex. I will provide only a few examples here. They fall into two categories, the first of which is silencing: (1) Epicurus, in his Letter to [*1536] Menoiceus, enumerating pleasures prized by most people, speaks of "the enjoyment of young men and of women," clearly meaning the enjoyment by his male addressee of sex with both young men and women. n65 Hicks, the Loeb translator, renders this as "sexual love." n66 (2) Plato's Phaedrus characterizes the highest life as that of "one who pursues the love of a young man along with philosophy," (paiderastesantos meta philosophias). n67 Loeb translator Fowler calls this person "a philosophical lover." n68 (3) The epigram on the death of Dion of Syracuse attributed to Plato ends with the famous line, "O Dion, you who drove my thumos (seat of emotion) mad with eros (passionate erotic love)." n69 Hicks again: "How deeply loved, how mourned by me." n70 (4) In Diogenes Laertius' Life of Socrates, Diogenes, speaking of Socrates' connection with Alcibiades, says, "Alcibiades ... with whom he was passionately in love [hou erasthenai], according to Aristippus." n71 Hicks renders this, "Alcibiades, for whom he cherished the tenderest affection ...." n72 Whatever eros is in the ancient world, it is not tender affection. Indeed, it is a strong sexual passion connected with madness and obsession.

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n65. Diogenes Laertius, Lives of Eminent Philosophers X.132.

n66. 2 Diogenes Laertius, Lives of Eminent Philosophers X.132 (R.D. Hicks trans., 1925) [hereinafter Hicks Eminent Philosophers].

n67. Plato, Phaedrus 249a.

n68. Fowler Phaedrus, supra note 57, at 481.

n69. Diogenes Laertius, Lives of Eminent Philosophers III.30.

n70. 1 Hicks Eminent Philosophers, supra note 66, at 305.

n71. Diogenes Laertius, Lives of Eminent Philosophers II.23.

n72. 1 Hicks Eminent Philosophers, supra note 66, at 153.

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The second category of inaccuracies, melodramatic moralism, is also ubiquitous. By terms such as "enormity" and "perversion" translators obscure moral distinctions that are of central importance to the Greeks. n73 My central example is the case of Bury's Loeb translation of Plato's Laws, n74 which I shall discuss in detail in Appendix 3. Here I content myself by mentioning two instances from the Laws, one in Bury and one elsewhere, neither of which is at all controversial. The Athenian Stranger, speaking in the Laws [*1537] of the origins of both male and female same-sex practices, concludes that we should trace these practices to the first participants' "weakness in the face of pleasure" (akrateian hedones). n75 Akrateia is a variant of akrasia, the word that gave us our modern philosophical word for "weakness" or "incontinence." It means, and is defined explicitly by Plato in the Protagoras as meaning, knowing the better (and being able to do the better) but doing the worse. n76 Loeb translator Bury renders the phrase as "slavery to pleasure." n77 But the

distinction between akrasia and compulsion is absolutely fundamental in Plato's psychology. Overtranslation has produced philosophical error. n78

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n73. Dover holds that Taylor (cited as one example among many) "by the use of words such as "perversion' " obscured "the profound difference between the attitude to the "active' partner and the attitude to the "passive' partner." Dover Letter I, supra note 48, at 1.

n74. Bury Laws, supra note 59.

n75. Plato, Laws 636c.

n76. Plato, Protagoras 352d-e.

n77. Bury Laws, supra note 59, at 636c.

n78. One might of course wonder in which moral direction the error runs: for frequently we blame people less, or not at all, for errors thought to be the result of a compulsion. But in Plato's vocabulary the idea of slavery is always highly pejorative, and in the context of appetite connotes a bad, usually highly blameworthy, condition of the personality.

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In Book VIII of the same work, Plato speaks of a high-minded type of male lover who, in his relationship with a younger male, focuses on the soul and "considers the desire of the body to be a side-issue" (parergon). n79 The reader may recognize the Greek term from its modern use to designate the less important writings of an author - as in Schopenhauer's Parerga and Paralipomena, designating works that are not his main systematic work, that are side-issues. Translator Auguste Dies in the French facing-page edition of the Bude series renders this, "[Il] n'a que dedain pour le desir du corps," n80 or "He has nothing but contempt for the desire of the body." Once again, overtranslation produces error: for neither Plato nor Schopenhauer does parergon mean "something one holds in contempt." Translating the Schopenhauer title as Works for Which One Should Have Nothing But Contempt helps illustrate the size of the error. Moreover, although the passage as a whole does hold that the lover in question prefers to withhold genital expression of his love, it never tells us that he attempts to extinguish bodily desire, or thinks of the desire itself as bad.

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n79. Bury Laws, supra note 59, at 837c.

n80. Platon, Les Lois, Livres VII-X, in Oeuvres Completes 837c (A. Dies trans., 1956).

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And so it must go with every word of every text with which we deal in these matters. In every instance, we need to approach these [*1538] matters with rigorous scholarship, scrutiny of all the occurrences of a term, and freedom from influence and prejudice. Even the most exacting scholar may lapse in this

area.

V

What, in general, does the Greek evidence show us, so approached? Here I can give only a sketch of the picture that I wish to defend. Fortunately, however, I need not give more, because on the general cultural situation I am in all major points in agreement with the conclusions of Kenneth Dover's magisterial work Greek Homosexuality. n81 This work is an invaluable resource for any lawyer or judge dealing with the issue of same-sex preference, whether or not expert testimony on the Greeks is in question. n82 As we approach the evidence, let us bear in mind the claim that Finnis wishes to make about ancient Athenian culture:

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n81. Dover, Greek Homosexuality, supra note 48. Although the work is less fully accessible to the lawyer, Dover's commentary on the Greek text in Dover Symposium, supra note 9, provides further discussion of his conclusions.

n82. Dover's results are conclusive and have been widely accepted by scholars whose politics and whose views on sexual matters vary widely. See, for example, the laudatory reviews of Greek Homosexuality by liberal scholar Bernard Knox in Bernard Knox, The Socratic Method, N.Y. Rev. Books, Jan. 25, 1979, at 5, and by the conservative scholar Hugh Lloyd-Jones in Hugh Lloyd-Jones, Women and Love, New Statesman, Oct. 6, 1978, at 442, reprinted in Classical Survivals 97 (1982).

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In classical Athens, there was amongst the Athenian upper classes an ideology of same-sex "romantic relationships" which were specifically man-boy relationships (inherently lacking the genuine mutuality of equals) and which in a certain number of cases doubtless resulted in sexual conduct. But even at the height of this ideology, a speaker addressing the Athenian Assembly-Court in 346/5 BC could confidently assume that the bulk of his audience would regard sexual conduct between males as involving at least one of the partners in something "most shameful" and "contrary to nature," so that that partner, at least, must "outrage (hubrizein) himself." I refer to Aeschines, Against Timarchus especially paragraphs 185 and 195, and am quoting from the translation of paragraph 185 given in K.J. Dover, Greek Homosexuality page 60. n83

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n83. Finnis Affidavit, supra note 25, 32.

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Bypassing, for the present, the inherent oddity of citing Dover in connection with an interpretation of Greek norms that Dover painstakingly demolishes, n84 let us instead turn first to more basic matters, beginning by enumerating the types of sources on which a scholar can draw in reconstructing the historical picture. n85

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n84. Dover argues that this part of Aeschines' speech is in important respects misleading concerning both legal and moral norms and that even Aeschines' antithesis itself "cannot rest upon a simple assignation of homosexuality to the category of the unnatural" but rests, instead, on an alleged unnaturalness for males of subordination and passivity. See Dover, Greek Homosexuality, supra note 48, at 67-68. And, as we shall see, Dover is far from holding that one party in a Greek homosexual relationship must subordinate himself in a shameful way.

n85. See Dover's treatment of this issue in Dover, Greek Homosexuality, supra note 48, at 1-17, and K.J. Dover, Greek Popular Morality in the Time of Plato and Aristotle 1-45 (1974) [hereinafter Dover, Greek Popular Morality].

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A. Visual Art

Of special importance are the numerous vase paintings depicting erotic and sexual activities. Most of these were produced between 570 and 470 B.C., thus prior to most of the literary evidence, as the first surviving Greek tragedy dates from 472 B.C. Because most derive from Corinth and Boetia, from which there is little literary evidence, caution must be exercised in linking the vases with Athenian culture; however, with caution they can illuminate many aspects of the Athenian cultural scene. Vases, explicit in their depiction of sexual conduct, have that advantage over literary sources, which are typically more reticent. n86 The vases are not scurrilous or pornographic; it can generally be inferred that the conduct they depict enjoyed broad acceptance. (They were not the property only of a narrow elite.) They show us much about the relationship of homosexual to heterosexual modes of courtship and copulation, and about what was found erotic in each case. On the other hand, they must be read with caution, because they are highly stylized and show cultural ideals or stereotypes more than daily reality. They sometimes also contain a dimension of rough [*1540] humor comparable to the humor of Aristophanic comedy, especially when they depict excretion. n87

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n86. The degree of reticence varies, of course, with the genre; even in lyric and tragedy, one discovers passages of an explicitly sexual character. See infra notes 109, 136 (discussing Sappho and Aeschylus, respectively). Interestingly, these two examples of explicitness are both homosexual; I cannot recall a case of similar heterosexual explicitness in early lyric or in tragedy.

n87. See Dover, Greek Homosexuality, supra note 48, at 152.

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B. Oratory

The central text in Dover's argument is a law-court speech from the year 346 B.C., Aeschines' Against Timarchus. Oratory is excellent evidence for popular attitudes, because the speaker had to persuade a jury of citizens chosen by lot, in matters in which much was at stake for his client. n88 In the absence of rules of relevance, any sort of innuendo or moral rhetoric might be used; and, if we often can discern little about what was really true in the case, we can learn a lot about what a jury might have been expected to find persuasive. Dover shows, however, that rhetorical distortions of fact can extend even to the presentation of the legal picture - so, again, caution is needed. Dover's own interpretation of the Aeschines speech is a paradigm of such properly cautious and skeptical reading. n89

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n88. See Dover, Greek Popular Morality, supra note 85, at 8-14.

n89. See supra note 84.

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C. Comic Drama

The comedies of Aristophanes and fragments of other comic poets are filled with frank sexual material. n90 The material is aimed at amusing the average audience, so it relies on some norms of what would be acceptable and what would be found shocking. But Aristophanes must be used with extreme caution in reconstructing what people seriously thought and did, just as we would not want hastily to conclude that the humor of a scathing sexual comic of today mirrored current attitudes. Athenians did not hesitate to poke fun at groups of all sorts, unconstrained by any notions of what it would be just or considerate to say - or even what reflected their own most serious views. The fact that they felt free to mock a person or a group says little about how they really regarded the person or group. n91 Furthermore, there is strong evidence that [*1541] comic mockery does not typically connote moral blame: some of the most common sources of humor in comedy are things like farting, defecating, smelling bad - concerning which no scholar to my knowledge has ever suggested the Greeks wished to take a serious posture of moral condemnation. n92

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n90. Aristophanes' surviving plays were produced at Athens between 425 and 388 B.C.; few surviving comic fragments in general can be positively dated earlier.

n91. One might compare the notorious third-year show written by law students at the University of Chicago, and no doubt similar shows at other law schools, where the students feel free to say extremely insulting things about their teachers, including their imagined sex lives. This does not imply very much about how the students view the teachers - or those ways of life - in daily life.

n92. For further observations on comedy, see K.J. Dover, Aristophanic Comedy (1972) (discussing, among other works, Aristophanes' Clouds). On sexual humor in comedy, see Jeffrey Henderson, The Maculate Muse: Obscene Language in Attic Comedy (2d ed. 1991).

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D. Other Literary Evidence

One may also draw on the poems of Sappho, dating from sixth century B.C.; the erotic poetry ascribed to Theognis, of highly dubious and possibly mixed date, extending from the seventh century B.C. to the Hellenistic period, i.e., after the fourth century B.C.; and the erotic poems of the so-called Greek Anthology, composed from the third century B.C. through, probably, early centuries A.D., though the most important texts derive from around 100 B.C.

E. Philosophy

Philosophers are in general not reliable sources for popular thought, but there are exceptions. Plato's dialogues contain, I would argue, no speech that Plato does not wish his reader to ponder seriously. On the other hand, some speakers are identified more clearly than others as spokesmen for popular views of the day. Among these, I think Dover is right to single out the speaker Pausanias in the Symposium. n93 I would add the speeches of Phaedrus and Aristophanes (though the latter seems to me an especially serious part of Plato's own design) n94 and, though with caution, the speech of Lysias and the first speech of Socrates in the Phaedrus. n95 [*1542] Aristotle's thought can sometimes be used, with caution, to reconstruct the reputable beliefs of his day. n96

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n93. See Dover, Greek Homosexuality, supra note 48, at 12-13, 81-84.

n94. See Nussbaum, supra note 8, at 171-76.

n95. Here I wish to retain the argument, advanced in The Fragility of Goodness, see id., that some aspects of those speeches reconstruct Plato's psychology as depicted in earlier dialogues. I did not, however, sufficiently stress their link with popular thought.

n96. My primary complaint against Michel Foucault, The Use of Pleasure (Robert Hurley trans., Random House 1985) (1984), for example, was that he failed to be sufficiently cautious in this regard, assuming that Plato, Aristotle, and Xenophon are all good sources for prevalent Greek views. See Martha C. Nussbaum, Affections of the Greeks, N.Y. Times Book Rev., Nov. 10, 1985, at 13 (reviewing The Use of Pleasure).

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F. Artemidoros

A writer of unusual interest for the student of sexuality is the dream interpreter Artemidoros of Daldis, who wrote during the second century A.D. n97 Dover did not use Artemidoros, as his cut-off date was the end of the Greek Anthology; but the seven or so centuries covered by his reconstruction is a far longer span than the gap of two centuries separating most of the Greek Anthology from Artemidoros. Given the diversity of his clientele, Artemidoros is a fine source for popular thought; Winkler provides convincing arguments "that Artemidoros' categorization of sexual acts corresponds to widespread and long-enduring social norms - that is, to the public perception of the meaning of sexual behavior." n98

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n97. The best treatment of Artemidoros on sex is in John J. Winkler, The Constraints of Desire: The Anthropology of Sex and Gender in Ancient Greece 17-44 (1990). Winkler also translates the relevant passages in an appendix. See id. app. at 210-16. The only complete English translation, Artemidorus, The Interpretation of Dreams (Robert J. White trans., 1975), is seriously defective and should not be trusted. I have been advised by Professor Hugh Lloyd-Jones, who has gone over various modern versions carefully, that the only one trustworthy enough to give to graduate students is the Italian translation Artemidoro, Il Libro Dei Sogni (Dario Del Corno trans., 1975).

n98. Winkler, supra note 97, at 24.

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In general, we may remark that the sexual attitudes and customs of the Greek world, as gleaned from these sources, do exhibit a remarkable constancy across place and time. As Dover observes, the "rate of change of Greek attitudes, practices and institutions ... was ... very slow compared with anything to which we are accustomed in our own day." n99 David Halperin, in his article on "Homosexuality" prepared for the new Oxford Classical Dictionary, expands on this point:

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n99. Dover, Greek Homosexuality, supra note 48, at 8.

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